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CURRENT EVENTS.

MR. JUSTICE LAMAR — LEGAL JOURNALISM. —We observe that one of our contemporaries seems disposed to criticise the *Albany Law Journal* for expressing its views of the nomination of Mr. Lamar to the office of associate justice of the Supreme Court of the United States, and thinks that the *Journal* has traveled out of the record and passed beyond the limits of the province of legal journalism. On this subject we have something to say. It is undeniable that all citizens have a perfect right to say what they please, orally or in print, about all public men, *as public men*, and of all public measures and events, and a citizen does not lose that right by becoming the editor of a legal journal. Nevertheless, on political questions, pure and simple, to express such opinions is bad form, but not absolutely *ultra vires*. On these questions the rule for a legal journal is reticence. "Silence is golden." In this matter, however, as in most others, the line must be drawn somewhere; and we draw it so as to exclude from tabooed political questions, all such as relate to legal rights or procedure, and especially to nominations to high judicial office. All topics of this latter character are germane to legal journalism, and its jurisdiction of them, if we may use the expression, is plenary. We think, therefore, that the *Albany Law Journal* might well, without reserve, or forfeiting its reputation as an impartial journal, express its views of Mr. Lamar's nomination, and to support those views go into his whole record, from childhood up.

And yet, for all that, we dissent absolutely from these views and the conclusions to which they have led our cotemporary. We regard nullification and secession, *et id genus omne* of political heresies as dead issues; as dead as Pharaoh's hosts that were buried under the Red Sea, and we think that hereafter no issue involving State rights, as connected with federal powers, can possibly come before the supreme court, save as a harmless constitutional question, of which the recent rulings in the Virginia and Kansas cases may be regarded as fair specimens.

The confirmation of Mr. Lamar, of course, closes all controversy on this subject, and it may well be expected that he will exhibit the calm judicial impartiality so befitting and so characteristic of his high office.

We doubt not that Mr. Justice Lamar will be able to eliminate from his system any secession views which may possibly still lurk therein after the lapse of twenty-two years, and fall into line with his associates. To their great credit it may be said that nobody can know, except from what in this fast age may fairly be considered as ancient history, whether in their anti-judicial days they were Republicans or Democrats, Secessionists or Greenbackers, or Prohibitionists; so completely have they obliterated all merely partisan political feeling. And the same high praise may justly be awarded, with a very few exceptions, to all their predecessors.

After taking the whole matter into very careful consideration, we have arrived at the agreeable conclusion that the union, the constitution, the peace and prosperity of the American people are perfectly safe from any malign influences that could possibly be exerted by Mr. Justice Lamar. We really think that a nation which successfully coped with serried hosts led by Lee and Stonewall Jackson, clad in the dread panoply of horrid war, is reasonably safe from a learned gentleman, clothed in the silken robes of peace, and seated upon a high-backed chair in the very *arcanum* of the national capitol.

NEW JERSEY COURTS.—The profession and the people of New Jersey are periodically afflicted by an agitation on the subject of the courts of that State, especially of those of light degree. Whenever the legislature is about to convene it is called upon by the legal journals and, presumably, by the profession generally, to do something to improve and simplify the judicial system of the State. The invariable answer to these appeals is that the constitution of the State stands as a lion in the path and forbids all innovation. The judicial system of the State is complicated and somewhat

puzzling to an outsider. There are three or four courts of higher grade, and the limits of their respective jurisdictions are not very clearly defined. This, we understand to be the complaint of the local journals, and we fully sympathize with them. We regard precision in matters of jurisdiction as of the greatest importance, and think that all other considerations should be subordinated to it. In our judgment, New Jersey would do well to reform its judiciary system by constitutional amendment, if necessary, conferring upon one supreme court exclusive appellate jurisdiction in all cases except those, so insignificant as to render such jurisdiction incongruous, inconvenient or oppressive.

NOTES OF RECENT DECISIONS.

CONSTITUTIONAL LAW—NAVIGABLE RIVERS—ORDINANCES OF 1777.—The Supreme Court of the United States recently decided a case involving an interesting question of constitutional law, and the construction of an instrument which antedates the constitution itself, viz: the ordinance of 1777.[1] The facts of the case were, that the Manistee River Improvement Company was duly incorporated by the State of Michigan, and impowered to improve the Manistee river, a stream lying wholly within the limits of that State, and to charge tolls to persons availing themselves of such improvements and thereafter using the river for purposes of navigation. The improvements were duly made and the plaintiff in error resisted the demand of the company for tolls, he being one of the parties who had so used the river. The case came by writ of error to the Supreme Court of the United States, Sands contending that the charter of the corporation infringed the constitution of the United States and the ordinance of 1777 as well.

Mr. Justice Field, in delivering the opinion of the court, said that the proposition was untenable that the exaction of tolls, under the statute of a State, "was the taking of property without due process of law;" that there was no analogy between the levying of taxes and the exaction of tolls, for the use of public improvements; that taxes are required for the support of the government and are compulsory; that tolls are merely compensation for the use of property of others, and that it is optional with the party whether he will use such property and pay for it or not. The court further held, that as the Manistee river was wholly within the State of Michigan, all commerce upon it was as fully within the jurisdiction of that State as interstate commerce is within the jurisdiction of the United States.[2]

To meet the costs of improvements of this character the State may levy a general tax, or authorize the imposition of tolls.[3]

With reference to the ordinance of 1777 the court expresses the opinion that, upon the admission of the States respectively which were formed out of the northwestern territory into the union, the rights of their inhabitants, under the ordinance of 1777, were merged in the higher rights which accrued to them as citizens of one of the sovereign States of the union. The court concludes, therefore, that no rights could be claimed by the plaintiff in error as having been derived from the ordinance of 1777, that the regulation of navigation of rivers flowing into the St. Lawrance, related only to the inhabitants of the northwestern territory, and not to the population of that territory after its subdivision into States.[4]

Mr. Justice Fields proceeds: "But, independently of these considerations, there is nothing in the language of the fourth article of the ordinance, respecting the navigable waters of the territory emptying into the St. Lawrence, which, if binding upon the State, would prevent it from authorizing the improvements made in the navigation of the Manistee river. As we said in Huse v. Glover[5] (decided at the last term): "The provision of the clause, that the navigable streams shall be highways without any tax, impost, or duty, has reference to their navigation in their natural state. It did not contemplate that such navigation might not be

[1] Sands v. Manistee, 8 S. C. Rep. 113.

[2] County of Mobile v. Kimball, 102 U. S. 691, 699.

[3] Huse v. Glover, 119 U. S. 543, 548; 7 S. C. Rep. 313.

[4] Permoli v. First Municipality of New Orleans, 3 How. 589, 600; Pollard's Lessee v. Hagan, *Id.* 212; Escanaba v. Chicago, 107 U. S. 678, 688; 2 S. C. Rep. 185; Van Brocklin v. Tennessee, 117 U. S. 151, 159; 6 S. C. Rep. 670; Huse v. Glover, 119 U. S. 544, 546; 7 S. C. Rep. 313.

[5] *Supra.*

improved by artificial means, by the removal of obstructions, or by the making of dams for deepening the waters, or by turning into the rivers waters from other streams to increase their depth. For outlays cause by such works the State may exact reasonable tolls."[6] And again: "By the terms tax, impost, and duty, mentioned in the ordinance, is meant a charge for the use of the government, not compensation for improvements."[7] We perceive no error in the record. and the judgment of the Supreme Court of Michigan must be affirmed; and it is so ordered.

[6] 119 U. S. 548; 7 S. C. Rep. 315.
[7] 119 U. S. 549; 7 S. C. Rep. 316.

"REAL ESTATE BROKERS."

To entitle a broker to commissions on a sale, it is necessary, first, that he should establish his authority to act as the agent or owner either by previous employment or by the acceptance of his agency and the adoption of his acts; and, secondly, he must show that the agency was the procuring cause of the sale.[1] It may aid therefore to clearness of statement and accuracy of conclusion, and perhaps remove some elements of debate, if we consider the legal attitude of a broker employed to buy or sell property, and his relative rights and duties as the basis of his claim for compensation.

The duty he undertakes, the obligation he assumes as a condition of his right to demand commission, is to bring the buyer and seller to an agreement. In that all the authorities substantially concur, although expressing the idea with many differences of phrase illustration. The description and definition of a broker involves this view of his duty.[2]

Story says: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation for a compensation commonly called brokerage."[3]

In Pott v. Turner, the court say a broker is more tersely and quite accurately described as one who makes a bargain for another and receives a commission for so doing. The duty of the broker consisted in bringing the minds of the vendor and vendee to an agreement.[4] It was also held that, to entitle the broker to commission, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involves the agreement of the buyer and seller, the meeting of their minds, produced by the agency of the broker.[5]

It was declared that the authorities clearly establish the proposition assumed in the contract with his principal he is not entitled to his agreed commission, and that obligation is fulfilled only when he produces a party ready to make the purchase at a satisfactory price.[6]

In Glentworth v. Luther the court say it is declared that the commission was earned when the broker produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase at an acceptable price. It was not meant by these cases, and we do not mean, that the broker must of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded.

He may just as effectually produce and create the agreement, though absent when it is completed and taking no part in the arrangement of its final details. And it is to describe such instances that courts have used a different form of expression, entirely accurate in its proper application, but capable of being warped from its obvious meaning.[7]

And in Lyon v. Mitchell the broader language is used that his efforts must have led to the negotiations that resulted in the purchase. But in all the cases, under the fundamental and correct doctrine, is that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue.[8]

[1] Chilton v. Butler, 1 E. D. Smith, 150.
[2] Stewart v. Mather & Another, 32 Wis. 344.
[3] Story on Agency, 28 P. 25.
[4] 6 Bing. 702, 706; Barnord v. Monnett, 16 How. Pr. 440.
[5] Wylie v. Marine National Bank, 61 N. Y. 416; Goss v. Brown, 18 N. W. Rep. 290; McGavock v. Woodlief, 20 How. (U. S.) Rep. 221; Walker v. Tirrell, 101 Mass. 257; Middleton v. Findla, 25 Cal. 76.
[6] Moses v. Bierling, 31 N. Y. 462; Delaplaine v. Turnley, 44 Wis. 31; Hamlin v. Schulte, 18 N. W. Rep. 415; Darrow v. Harlow, 21 Wis. 302; McArthur v. Slauson, 53 Wis. 41.
[7] Glentworth v. Luther, 21 Barb. 147; Lloyd v. Matthews, 51 N. Y. Rep. 124.
[8] Lyon v. Mitchell, 36 N. Y. 237; McGavock v.

The phrase used in Loyd v. Watkins was that the broker was entitled to reward when the sale was effected through his agency as the procuring cause.[9]

It follows as a necessary deduction from the established rule that a broker is never entitled to commission for unsuccessful efforts. The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor and expend his money with ever so much devotion to the interest of his employer, and yet if he fails without effecting an agreement or accomplishing a bargain, he abandons the effort or his authority is fairly and in good faith terminated, he gains no right to commissions, he loses the labor and effort which was staked upon success. And in such event it matters not that, after his failure and the termination of his agency, what he has done proves of use and benefit to the principal.

In a multitude of cases that must necessarily result, he may have introduced to each other parties who otherwise would have never met; he may have created impressions which under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest, but all that gives him no claim. It was part of his risk that, failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors.[10]

And in Wylie v. Marine National Bank, *supra*, in such a case the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not, the sale is to the very party with whom the broker had been negotiating.[11]

He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure therefore and its consequences were the risk of the broker only. This however must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing and consenting to the prescribed terms, is produced, or if the latter declines to complete the contract because of some unremoved incumbrances, some defect which is the fault of the latter, then the broker does not lose his commissions.[12]

Where no time for the continuance of the contract is fixed by the terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course, to the right of the seller to sell independently.[13] But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith and as a mere device to escape the payment of the broker's commissions. Thus if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker, with the view of concluding the bargain without his aid and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruit of the broker's labor. Judge Daniels said in the case of Satterthwaite v. Vreeland,[14] to maintain a claim

Woodlief, 20 How. (U. S.) Rep. 221; Kock v. Emmerling, 22 How. (U. S.) 72.

[9] Higgins v. Moore, 34 N. Y. 424; Moses v. Bierling, 31 N. Y. 464; Lloyd v. Watkins, 51 N. Y. 132.

[10] 18 Cent. L. J. 317.

[11] 3 Waits' Action & Defenses, 287; Vreeland v. Vetterlein, 33 N. J. Law, 247; Lane v. Albright, 49 Ind. 275; Darrow v. Harlow, 21 Wis. 302.

[12] Moses v. Bierling, 31 N. Y. 462.

[13] McClave v. Paine, 49 N. Y. Rep. 561; Dolan v. Scanlon, 11 Reporter, 833.

[14] 3 Hun, 152.

by the broker for his commissions, it was necessary that he should be able to show that he had either procured a purchaser for the property at the price for which he was empowered to sell, or that the seller had deprived him of the opportunity to do so while the privilege lasted.

ALBERT N. KRUPP.

LIFE ESTATE — REMAINDERMAN — TENANT FOR LIFE—ASSESSMENTS—TAXATION.

THOMAS V. EVANS.

Court of Appeals of New York, June 7, 1887.

1. A life tenant may not charge the remainderman with the cost and expense of permanent improvements put upon the property by him during the tenancy.

2. Municipal assessments for permanent improvements upon land are apportionable between the life tenant and the remainderman, according to the circumstances of each case, and their respective interests in the property.

3. Ordinary taxes are chargeable solely to the life tenant.

4. A trustee or mortgagee in possession, who, in good faith, supposes that he has acquired title to the property, and deals with it as his own, by making improvements which are a permanent benefit to the property, is entitled to a reimbursement of his expenditures.

4. The defendant acquired what he supposed was a clear title to certain real estate, paid taxes and municipal assessments upon it, and made permanent improvements thereon. The remaindermen, twenty years after the life estate had been extinguished, brought suit for possession. It was held that they must first pay the purchase price given by the defendant, such sums as were expended in permanent improvements, and in case he was charged with the rents he received from the property after the death of the life tenant, that he be allowed interest on the amount payable to him.

RUGER, C. J., delivered the opinion of the court:

In July, 1841, Thomas Thomas died, leaving him surviving Catharine Thomas, his widow, and four children, aged, respectively, three, five, and six, and Sarah Thomas, who has since died intestate. At the time of his death, Thomas owned in fee eight small city lots in Williamburgs, six of which were situated on South First, and two, of lesser value, on South Second streets, and, with the exception of two lots on South First street, were vacant and unimproved. So far as appears from the case, Thomas had no other property, real or personal, and such as he had he devised to his widow for life, with remaider to his four children. By the will he appointed his wife executrix, and John L. Bulkley executor, of his estate, and authorized them to "sell the whole or any part of his real estate when they may deem best for those interested therein, either at public or private sale, and invest the proceeds in bonds and mortgages or other securities as they may believe best." He also appointed his wife guardian of all of his children. In December, 1841, the widow intermarried with the defendant Evans, and lived with him as his wife until the year 1878, a period of thirty-seven years, and nearly twenty years after all of the children had arrived at maturity.

It is conceded that, by the will, the widow took a life estate in the property of her husband, and that, upon her marriage with Evans, he became entitled to the enjoyment of her interest therein, and that the four children took a vested estate in remainder in such property. Between the years 1841 and 1850 the defendant Evans made considerable improvements upon the property on South First street, and rendered some of it productive which before was a burden and expense to the estate. For the purpose partly of paying the liability of the estate to Evans for these improvements, and, partly to raise money to meet anticipated assessments upon the property, the executors, in 1850, sold and conveyed to Evans, for the agreed price of $1,000, the two vacant lots on South Second street. Three hundred and fifty dollars of this sum was applied as a payment to Evans for the expenses incurred by him, and the balance of $650 was secured by a mortgage upon the property given by Evans to the executors. The price paid was a fair consideration for the land, and all parties then supposed that Evans acquired a valid title under the power of sale contained in the will. Subsequently, however, upon attempting to raise money upon the lots for building purposes, Evans was advised that, by reason of his relationship with one of the grantors, his title was defective, and thereupon he consented to institute an action to have such title declared void, and to reinstate the power of sale in the executors. Such proceedings were thereupon had in the supreme court that judgment was rendered declaring the conveyance from the executors to Evans null and void, and reinstating them with the interest attempted to be conveyed.

Between 1850 and 1854, heavy assessments were levied upon the property of the estate for municipal improvements, and the executors had no means to pay them. These assessments were mainly levied upon the lots on South First street. At the request of the executors, Evans advanced some money to pay them, but the estate was still unable to meet the other burdens upon the property. Under the circumstances, the defendant Evans, under an agreement with one Swackhamer that he would repurchase the property, and repay him its cost, and such money as he should expend upon it, with a bonus of $500 for his risk and trouble, induced Swackhamer to enter into a contract of purchase of the two lots on South Sec-

ond street with the executors for the price of $2,000. In 1853 the executors conveyed the property to Swackhamer, receiving therefor $300 in cash, Swackhamer's note for $700, and a release by Evans to the executors of their indebtedness to him for money advanced and expended for assessments and improvements upon the property. The price paid was more than the value of the property, and the Thomas estate received the full benefit thereof. It does not appear that the executors had any knowledge of the agreement between Evans and Swackhamer, or that any of the parties had any doubt but that Swackhamer acquired a valid title to the property by the conveyance. Upon receiving his deed, Swackhamer executed a mortgage upon the property to third parties for the sum of $4,500, which sum was wholly expended in erecting three substantial brick dwellings upon the two lots. In 1856, in accordance with his agreement with Evans, Swackhamer conveyed the property to him, receiving in payment therefor the sum of upwards of $7,000. Immediately upon receiving the deed, Evans caused it to be placed upon record, and from that time forward claimed to be the absolute owner of the property. Since Evans' occupation of the lots, he has continued to make additions to and improvements upon them, the value of which, including the original cost of the houses as found by the trial court, exceeded $9,000 at the time of the trial. In 1879, Evans conveyed to each of the two other defendants, Catharine J. Scofield and Jessie E. Scofield, one of the houses erected on the two lots on South Second street as a gift out of consideration of love and affection for them as his daughters.

This action was brought by two of the remaining children of Thomas, the other one refusing to join therein as a plaintiff, in April, 1881, for the purpose of vacating and annulling the deed given by the executors to Swackhamer, and all subsequent conveyances of the property, and having it adjudged that the two lots, with their improvements, were the property of the plaintiffs, and requiring the defendants to release and convey the property to them, and that the defendant Thomas J. Evans render an account of all of his transactions with the estate of Thomas Thomas, and be decreed to pay to the plaintiffs such sums as might be found due upon such accounting. The right to relief was based exclusively upon the allegation in the complaint that the defendant Evans obtained title to the property from the executors "for the purpose of enabling the executors more conveniently to manage the said estate through the defendant Thomas J. Evans, and with a view to increase the revenue for the said real estate, and to put the title thereof in the said Thomas J. Evans as trustee for the said Catharine Evans, and the children of the said Thomas Thomas, deceased." Upon the trial no proof was offered by the plaintiffs of the existence of the trust and agreement alleged in the complaint, but the action was sustained upon the ground that the conveyance by which the land was transferred from the executors of Thomas to Swackhamer was not a valid exercise of the power of sale given to them by the will of Thomas, and constituted a cloud upon the title of the true owners, which should be removed. The decree also denied to the defendant the right to compensation for the improvements made to the property by him. The ground upon which this conclusion was reached, is stated to be that Evans was not a *bona fide* purchaser of the premises. This conclusion was based upon the finding of law made by the trial court that neither Evans nor the other defendants were *bona fide* purchasers of the land.

It is not entirely clear what the trial court meant by this finding of law; but, if it was intended to convey any other idea than that it was simply a legal deduction from the assumed fact that the conveyances to Swackhamer and Evans were void by reason of the alleged invalidity in the execution of the power of sale, it is contrary to the findings of fact made by the court, and is unsupported by any evidence in the case. It was found by the trial court that from 1856 Evans always claimed to be the absolute owner of the property; and that this claim was known to and acquiesced in by the plaintiffs appears from the allegations of the complaint. It is therein averred that "the plaintiffs have all been for many years of full age, and have not requested the transfer of said title to them because of the positive assurance they all had from the said defendant, and from the said testatrix in her life-time, that the same was held for the estate, and because their mother, the said testatrix, was entitled to the income of the same until her death." This excuse, so far as it alleges any assurance from the defendant Evans, or his wife, of the existence of a trust, is not, as we have seen, supported by the evidence. It also appears that some, if not all, of the surviving children of Thomas, after their majority, had knowledge of the expenditures that the defendant Evans made, not only upon the property in dispute, but also upon the other real estate remaining unsold, and, so far from making any objection thereto, actually requested them to be made.

A careful perusal of the evidence in the case shows us that Evans, in the right of his wife, came into the possession of the eight lots in 1841; and, although both he and the estate were destitute of means to improve it, or to pay the taxes or assessments levied thereon, it was so managed as to make it more valuable and productive, and to preserve for the remaindermen the greater part of the estate. In the meanwhile he provided a home for the widow and children of Thomas, and educated and supported the children, not only until their majority, but some of them until long after that time. Under these circumstances, it is not strange that the remaindermen have hesitated so long to assert any rights to the two lots in question, and that one of them refused altogether to become a party to the proceeding.

A claim to recover back property which has

been fairly sold and paid for at its full value, and the consideration of which has accrued to the benefit of the plaintiffs, without offering to render compensation to one who honestly believing himself to be its lawful owner, expended large sums in its improvement, and which now constitutes its greatest value, seems to be unjust and inequitable. We are of the opinion that the purchase price originally paid for the land, and the value of the improvements, to the extent that they have added to its permanent value, constitute an equitable claim; and that, even if the plaintiffs should establish an equitable right to the property, it would not entitle them to judgment therefor except upon the condition of refunding to the defendant Evens the amount so expended.

It was found by the trial court that the purchase price was mainly paid in relieving the land from the assessments imposed upon it. These assessments were a charge upon all of the land; and the interest of the remaindermen, as well as that of the life tenant, was liable to be sold therefor. It is provided by statute, in the case of real property in which several persons have successive interests, incumbered by taxes and assessments rendering it liable to sale therefor, that, upon the application of any of the parties interested, the court may order a sale of the fee, or a part thereof, for the purpose of discharging the liens upon the remainder. Laws 1841, ch. 341; Laws 1855, ch. 327; Jackson v. Babcock, 16 N. Y. 246; Dikeman v. Dikeman, 11 Paige, 484. Thus the property of the plaintiffs was legally liable for the payment of these assessments. Although the method provided by statute was not pursued, we see no reason why a court of equity, called upon to settle the equitable rights of the parties, should not charge remaindermen with the reimbursement of moneys actually and honestly expended for the benefit of their estate, and which they were legally liable to pay. The general rule applicable to the relation of life tenants and remaindermen does not authorize the former to charge the latter with the cost, and expense of permanent improvements put upon the property by them during the life tenancy. Dent v. Dent, 30 Beav. 363; Moore v. Cable, 1 Johns. Ch. 385. This rule is founded upon principles of justice having reference to the rights and interests of remaindermen, and should not be inconsiderately impaired or evaded. It is also the general rule that municipal assessments for permanent improvements upon land are apportionable between the life tenant and the remaindermen according to the circumstances of the case, and their respective interests in the property (Stillwell v. Doughty, 3 Bradf. 359; Peck v. Sherwood, 56 N. Y. 615); while the ordinary taxes of government are properly chargeble to the life tenant alone. Deraismes v. Deraismes, 72 N. Y. 154; Cairns v. Chabert, 3 Edw. Ch. 312.

Such are the rules applicable to those relations when they are open and acknowlged, and no special circumstances exist authorizing the application of principles of equity to reimburse one who in good faith has increased the intrinsic value of the property by expending his own means in making permanent erections and valuable additions thereto under the belief that he was its lawful owner. Such circumstances are held to exist when a trustee or mortgagee in possession, supposing in good faith that he has acquired title in and to the property, goes on and deals with it as his own, and makes improvement which are of permanent benefit to the property. Putnam v. Ritchie, Paige, 390; Mickles v. Dillaye, 17 N. Y. 86.

In the Putnam case the chancellor laid down the rule, as expressed in the head-note, that "when industrial accessions have been made to property in good faith by a person who has the legal title to the property, so that the real owner is compelled to resort to a court of equity to assert his equitable title to such property, this court acts upon the civil court rule of natural equity, and compels the complainant to compensate the adverse party for such industrial accessions or improvements, as a condition of granting the equitable relief asked for in the suit." This was the case of a guardian in socage of infants having a leasehold estate in fee in certain lands, which lease, during the infancy of the wards, was, for a good consideration, surrendered by such guardian to the heir of the lessor. It was held that a guardian in socage has no right to surrender a lease fee belonging to his wards; but that when the legal title is in a trustee, or when the guardian of an infant has complete legal control over the property so as to place it fully within the power of the chancellor as the general guardian of infants, the court may sanction the acts of the trustee or guardian, although not strictly legal, if the same are done in good faith, and for the benefit of the estate of the infant.

In Mickles v. Dillaye, 17 N. Y. 86, the rule was applied to a mortgagor who attempted to redeem from a mortgagee in possession under a voidable sale, and the rule adopted is expressed in the head-note of the case as follows: "When valuable and permanent improvements have been made in good faith by a person standing upon the legal footing of a mortgagee in possession, but who supposed himself to have acquired the absolute title, and such mistake was favored by the omission of the owner, for several years before and after the improvements, to assert any interest in the premises, the mortgagor, on asking the aid of equity to redeem, will be compelled to allow the value of the improvements, though exceeding the rents and profits received." In Bright v. Boyd, 1 Story, 478, lands had been sold by an administrator, but the sale was void because he had not given security according to the statute. The heir sued the purchaser, and recovered possession of the land. The purchaser then filed his bill in equity to recover from the heir the value of certain improvements, including the cost of building a large dwelling-house which he had, in good faith, put upon the premises while occupying

them. Judge Story referred the case to a master to take an account of the enhanced value of the premises, with a strong intimation that the plaintiff was entitled to recover that expense, but postponed the final decision of the question until the coming in of the master's report. Judge Denio, citing this case in Mickles v. Dillaye, entertained some doubt whether it could be sustained here except upon the principle of estoppel against one fraudulently standing by and seeing another expend money upon his land, although he expressly approved the rule laid down by the chancellor in Putnam v. Ritchie. In the same case he also approved of the doctrine laid down by Judge Hand in Wetmore v. Roberts, 10 How. Pr. 51. In that case the defendant had bought the premises from one who had purchased them upon a sale on a prior mortgage, in the foreclosure of which a junior mortgagee had not been made a party. Upon a foreclosure of the junior mortgage, it was held that the premises should be sold, and the defendant should be paid from the purchase money, not only the amount due on the elder mortgage, but also for improvements made by him during his occupation of the property.

In Miner v. Beekman, 50 N. Y. 339, it was said by Grover, J., that "when a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments and for such improvements, according to the just and enlightened principle of courts of equity.

Pomeroy, in a note to § 1242 of his work on Equity Jurisprudence, states the rule as follows: "When a person in peaceable possession under claim of lawful title, but really under a defective title, has in good faith made permanent improvements, the true owner, who seeks the aid of equity to establish his own title, will be compelled to reimburse the occupant for his expenditure." Many authorities are cited in support of the proposition.

In Ford v. Knapp, 102 N. Y. 135, 6 N. E. Rep. 283, the principle is laid down that in an action by a co-tenant out of possession for a partition of the premises upon which the other tenants in common have paid taxes and made improvements in good faith, which have largely increased the value of the property, the amount of such taxes and improvements shall, in case of "sale of the property," be first deducted from the gross sum received, and paid to the improving tenants, and the balance only divided among the parties according to their respective interests. The case was decided upon the rule "that one who seeks equity must do equity." and that the tenant out of the actual occupation, who seeks a court of equity to award him partition, is entitled to relief only upon condition that the equitable rights of his co-tenant shall be respected.

We think the circumstances of this case bring it within the principles of the cases above cited. Previous to the year 1860, all of the remaindermen had arrived at years of maturity, and were aware that the defendant Evans claimed to be the absolute owner of the property in question. For over twenty years they not only neglected to dispute such claim, but permitted the defendant to go on in apparent security as to his title, and make improvements upon the property, and deal with it as his own. There seems to exist here the natural equity which entitles a party who has in good faith, with his own means, improved the property of another, to reimbursement by the parties benefited thereby, but this equity is strengthened by the conduct of the owners, who stood by and saw such party, without notice or objection, incur expense under the belief that he was improving his own property. We are therefore of the opinion that the trial court should have imposed, as the condition of any relief to the plaintiffs, the reimbursement by them to Evans of the original price paid by Swackhamer for the lots, and also of such sums as were expended by Swackhamer and Evans in their improvements, so far as they have increased the value of the land; and, in case Evans is charged with the rents received from the property since the death of the life-tenant, he should be allowed interest on the amount payable to him.

The plaintiffs have sought their remedy in equity, and that course seems to have been requisite as the condition of a right to the relief demanded. The deed from the executors to Swackhamer apparently conferred the legal title under the power of sale contained in the will. The purchaser was under no responsibility for any misapplication by the executors of the consideration paid by him for the land, and was entitled to rely upon their apparent power to receive such consideration, and to convey the land given to them by the will. 3 Rev. Stat. (1st ed.), § 66, p. 2183.

We have altogether refrained from discussing the question as to whether the conveyance by the executors to Swackhamer was a valid execution of the power of sale. There seems to be much reason for saying, under the peculiar condition of this property, its unproductive character, and the want of means in which the testator left his family, the liability of the property to be sold for taxes and assessments for municipal purposes, that the real limitation intended to be put by the testator upon the power of sale was contained in the words that it should be sold when his executors "may deem best for those interested therein," and not in the language by which they were directed "to invest the proceeds in bonds and mortgages or other securities as they may believe best." Some diversity of opinion, however, exists among the members of the court upon this question, and we therefore refrain from determining it, believing that the point decided will substantially dispose of the case upon a retrial.

The judgments, both interlocutory and final, of

the courts below, are reversed, and a new trial ordered, with costs to abide the event.

(All concur.)

NOTE.—*The Tenant for Life Must Pay All Taxes.*—"The tenant for life owes it to the remainderman to keep down the taxes, and if, through his failure to perform this duty, the estate in remainder is sold, destroyed or wasted, why may he not be required to make the loss good? If, through failure of the tenant to pay the taxes, if the income of the estate is sufficient to discharge them, the estate is sold and conveyed to another beyond the power of the remainderman to recover it, it is, as to him, destroyed, wasted and the inheritance gone, and the tenant should pay for the lot."[1]

"One thing is certain, the defendant, by his neglect, has caused the disherison of the plaintiff. True, he has not done so by any of the acts of omissions usually named in the books or instance of waste. But is that important? Is it material by what act or omission the destruction of the inheritance is brought about? The result is what causes the injury and damage, and not the mode or manner of its accomplishment. The defendant has been guilty of a great wrong toward the plaintiff, much akin to possessor's waste, and the result has been the entire loss of her interest in the property. She ought to have a remedy." This was a case where a tenant for life failed to pay the taxes and to keep down the interest on an existing incumbrance, in consequence of which the estate was sold and lost to the remainderman. The tenant for life was held liable.[2]

"If the lot was entirely unproductive, was it the duty of the tenant for life to improve it and make it sufficiently productive to pay the taxes and charge upon it, or, failing so to do, was she bound, as such tenant, to pay the accruing taxes and charge? We think she was not. She might, it is true, have erected buildings upon the lot, and thereby made it productive, but had she erected buildings, however permanent and beneficial they may have become to those in remainder, she could neither have charged their cost upon the estate nor upon those in remainder. We think she was not bound to improve the lot in order to render it productive. The tenant for life, as well as the remainderman, must be regarded as the object of the donor's bounty, and to hold her bound to expend money for the protection of the interests of the remainderman, beyond the income of the property, would be unjust and opposed to the presumed intention of the donor."[3]

"Appellants insist that, *prima facie*, it is the duty of the tenant for life to pay the taxes. But we hold that the duty is not absolute, but conditional; that it is dependent upon the productive capacity of the estate; that if the property is unproductive, the duty does not exist; that, therefore, the remainderman cannot complain of the failure of the tenant for life to pay the taxes, without showing that the estate was productive, and that, for this reason, the burden as to this question was upon the appellants."[4]

The fact that land is devised by the husband to his wife for life for a home for her does not relieve her of the burden of paying the taxes.[5]

The rule is general that the life tenant must pay all taxes accruing during his life estate.[6]

Assessments for Permanent Improvements.—"Assessments for permanent improvements must be treated as an incumbrance to which the life tenant must contribute to the extent of the interest during his life on the amount paid at his death. * * * * Strict adherence to this rule would require the tenant for life to pay interest annually, though for convenience the value of such an annuity is usually paid at once."[7]

The rule of contribution is confined to those assessments for permanent improvements, and if such improvements are of such a nature that they will require frequent removals, the expense must be borne by the life tenant alone.[8]

Pay for Improvements.—The right of a *bona fide* purchaser to recover for improvements made upon real estate, to which he supposed he had a good title, was much discussed in Bright v. Boyd.[9]

In this case it was said: "The other question as to the right of the purchaser, *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principles of courts of equity, acting *ex æquo et bono*, I should aver that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, '*Nemo debet locupletari ex alterius incommodo*,' or as it is still more exactly expressed in the digest, '*Juris naturæ æquum est neminem cum alterius detrimento et injuria fieri locupletiorem.*' I am aware that the doctrine of equity has not yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* purchaser for a valuable consideration without notice, seeks an account on plaintiff against such possessor for the rents and profits, it is the constant habit of courts of equity to allow such possessor (or defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate, and thus to recoup them from the rents and profits.[10] So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such

1 Clark v. Middlesworth, 82 Ind. 249.

2 Wade v. Malloy, 16 Hun, 226.

3 Clark v. Middlesworth, 82 Ind., p. 251; Brooks v. Brooks, 12 S. C. 422.

4 Clark v. Middlesworth, 82 Ind., p. 253.

5 Deraismes v. Deraismes, 72 N. Y. 154.

6 Cairns v. Chabert, 3 Edw. Ch. 312; Prettymen v. Walston, 34 Ill. 192; Varney v. Stevens, 22 Me. 331; Lawrence v. Holden, 3 Bradf. 142; Stillwell v. Doughty, 2 Bradf. 311; Arnold v. Mower, 49 Me. 561; Fleet v. Dorlan, 11 How. Pr. 489; Hepburn v. Hepburn, 2 Bradf. 76; Whitson v. Whitson, 53 N. Y. 479. In Ohio, by statute, the life tenant forfeits his estate to the remainderman, if he fails to keep down the taxes: McMillan v. Robbins, 5 Ham. 28. See, generally, Patrick v. Sherwood, 4 Blatchf. 112; McDonald v. Heylin, 4 Phila. 73; Johnson v. Smith, 5 Bush, 102; Jewell's Estate, 1 W. N. C. 401; Piper's Estate, 2 W. N. C. 711; Fox v. Long, 8 Bush, 551.

7 Plympton v. Boston, 106 Mass. 547. See Cairns v. Chabert, 3 Edw. Ch. 312. The matter in New York is regulated by statute: Fleet v. Dorlan, 11 How. Pr. 489; Stillwell v. Doughty, 2 Bradf. 211; Estate of Miller, 1 Fisk, 346; Gunning v. Carmon, 3 Redf. 69.

8 Hitner v. Eye, 23 Pa. St. 305. See Whyte v. Nashville, 2 Swans. 364, where this distriction was ignored.

9 1 Story, 478.

10 Citing Green v. Biddle, 8 Wheat. 77.

bona fide possessor for the amount of his meliorations and improvements of the estate beneficial to the true owner. In each of these cases the court acts upon an old and well-established maxim in its jurisprudence, that he who seeks equity must do equity. But it has been supposed that courts of equity do not and ought not to go further, and to grant active relief in favor of such a *bona fide* possessor, making permanent meliorations and improvements, by sustaining a bill brought by him therefor against the true owner after he has recovered the premises at law, I find that Mr. Chancellor Walworth, in Putnam v. Ritchie,[11] entertained this opinion, admitting at the same time that he could find no case in England or America where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be reluctant to be the first judge to lead such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a *bona fide* purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate ten times the original value of the land, under a title apparently perfect and complete, is it reasonable or just that in such a case the true owner should recover and possess the whole without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable to thus appropriate to one man the property and money of another who is in no default. The argument, I am aware, is that the moment the house is built it belongs to the owner of the land by mere operation of law, and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest that the claim of the *bona fide* purchaser under such circumstances is founded in equity. I think it is founded in the highest equity; and in this view of the matter I am supported by the positive dictator of the Roman law. The passage already cited shows it to be founded in the clearest natural equity, '*Jure naturæ æquum est.*' And the Roman law treats the claim of the true owner, without making any compensation, under such circumstances, as a case of fraud or ill faith. [Here the court makes copies extracted from the Roman law, and the law of Scotland, which we omit.] Now, in the present case, it cannot be overlooked that the lands of the testator now in controversy were sold for the payment of his just debts under the authority of law, although the authority was not regularly executed by the administrator in his mode of sale, by a non-compliance with one of the perquisites. It was not, therefore, in a just sense, a tortious sale; and the proceeds thereof, paid by the purchaser, have gone to discharge the debts of the testator, and so far the lands in the hands of the defendant (Boyd) have been relieved from a charge to which they were liable by law. So that he is now enjoying the lands free from a charge which in conscience and in equity he, and only he, and not the purchaser, ought to bear. To the extent of the charge from which he has been thus relieved by the purchaser, it seems to me that the plaintiff, claiming under the purchaser, is entitled to reimbursement, in order to avoid a circuity of action, to get back the money from the administrator, and thus subject the lands to a new sale, or at least in his favor in equity to the old charge. I confess myself to be unwilling to resort to such circuity in order to do justice where, upon the principles of equity, the merits of the case can be reached by affecting the lands directly with a charge, to which they are *ex æquo et bono* in the hands of the present defendant clearly liable."[12]

In the Supreme Court of the United States it was said: "Another principle which we think applicable to this case is to be found in a class of cases where a *bona fide* purchaser, for a valuable consideration, without notice, has enhanced the value of the property by permanent expenditures, and has been subsequently evicted by the true owner on account of some latent infirmity in the title. It is well settled, if the true owner is obliged to come into a court of equity to obtain relief against the purchaser, the court will first require reasonable compensation for such expenditure to be made, upon the principle that he who seeks equity must first do equity. A kindred principle is also found in a class of cases where there has been a *bona fide* adverse possession of the property tacitly acquiesced in by the true owner. The practice of a court of equity in such cases does not permit an account of rents and profits to be carried back beyond the filing of the bill. This principle is applicable where the person in possession is a *bona fide* purchaser, and there has been some degree of remissness, or negligence, or inattention on the part of the true owner in the assertion of his true rights. Courts of equity, it would seem, do not grant active relief in favor of a *bona fide* purchaser, making meliorations and improvements, by sustaining a bill brought by him against the true owner after he has succeeded in recovering the property at law. The civil law in this respect is more liberal, and provide a remedy in behalf of the purchaser, even beyond an abatement of the rents and profits for such expenditures as have enhanced the value of the estate; and, indeed, generally applies the principle in favor of any *bona fide* possessor of property who has in good faith expended his money for its preservation or amelioration; otherwise, it is said, the true owner appropriates unjustly the property of another to himself."[13]

In a subsequent case it was said: "Where a party, lawfully in possession under a defective title makes permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements."[14]

There are many cases supporting the doctrine announced in these quotations.[15]

[11] 6 Paige, 390.

[12] This point was afterwards affirmed in the same case: 2 Story, 605.

[13] Williams v. Gibbs, 29 How. 535.

[14] Canal Bank v. Hudson, 111 U. S. 66.

[15] Rathburn v. Colton, 15 Pick. 471; Sohier v. Eldredge, 103 Mass. 345; McLaughlin v. Barnum, 31 Md. 425; Miner v. Beekman, 50 N. Y. 337; Sale v. Crutchfield, 8 Bush, 636; Smith v. Drake, 8 C. E. Green, 302; North Hudson R. Co. v. Booraem, 28 N. J. Eq. 450; Winton v. Fort, 5 Jones Eq. 251; Mills v. Tobie, 41 N. H. 84; Balkum v. Briare, 48 Ala. 75; Putnam v. Ritchie, 6 Paige, 403; Hodgkins v. Price, 141 Mass. 162; Show v. Hill, 46 Ark. 333; Hannibal, etc. R. Co. v. Shortridge, 86 Mo. 662; Miller v. Clark, 56 Mich. 337; Turnipseed v. Fitspatrick, 75 Ala. 295; Howard v. Massengale, 13 Lea, 577; Thompson v. Comstock, 59 Tex. 318; Baldwin v. Culden, 51 Mich. 33; Kibbe v. Campbell

So, if a mortgagee has made permanent improvements under the belief that he has acquired an absolute title by foreclosure, upon a subsequent redemption he is allowed the full value of them,[16] especially if the mortgagor by his actions has, to any extent favored the mistaken belief.[17] The same is true of the purchaser under the foreclosure sale.[18] Likewise of a purchaser in good faith from a mortgagee in possession, with the assurance that he got a perfect title;[19] or if the mortgagee raises no objection to their being placed thereon after the purchaser has been in possession for a long time.[20]

Sugden declares the rule to be that, "where a purchaser, after the conveyance, or even before the conveyance, in prospect of the articles for sale being carried into execution, has laid out money in lasting improvements, there are but few cases in which he will not be allowed for them, in case the aid of a court of equity is required to relieve against the purchaser."[21] He also further states: "And even supposing the court to be unwilling to make an allowance for repairs and improvements, yet if an account of rents and profits is to be taken, and the plaintiff will not accept the account, according to the value of the estate when the purchaser entered, but insisted to have the account taken according to the present value, the court will compel him to make an allowance for repairs and improvements."[22]

In the rules heretofore stated, a *bona fide* purchaser was always considered to be the one asking for the value of his improvements. A purchaser with notice is not such a person. The author already quoted from has said on this subject: "If, however, a man has acted fraudulently, and is conscious of a defect in his title, and with that conviction in his mind expends a sum of money in improvements, he is not entitled to avail himself of it. If a different rule should prevail, it would certainly, as Lord Clare remarked, fully justify a proposition, once stated at the bar of the court of chancery in Ireland, that it was a common equity to improve the right of owner out of the possession of his estate. However, if the sums are large, that circumstance may influence the court in decreeing an account from the time of filing the bill only, and not from the time of taking possession."[23]

So, it has been ruled that one buying land from one not the owner, with notice of the equities of the real owner, is not entitled to payment for improvements made, without the express or implied contract of such owner.[24] So, one purchasing under a foreclosure proceeding of a senior mortgage, having constructive notice of a junior mortgage, duly recorded, holds the land as if he had himself mortgaged it, and all buildings and permanent improvements made by him thereon become subject to the lien of the junior mortgage. A purchaser of real estate is chargeable with notice of a judgment lien, and if he make valuable improvements, although in actual ignorance of the lien, he cannot, by paying upon the judgment the value of the property, without the improvements, release the property from the lien of the judgment if not fully paid.[26] Statutes are often passed allowing a *bona fide* purchaser for improvements made. These statutes usually give nothing more than the relief afforded in a court of equity.[27]

Often the question arises, "who is a *bona fide* purchaser?" The Supreme Court of the United States has said that a *bona fide* possessor is one "who, not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is contested by some other person claiming a better right to it," and that after such occupant has notice of such claim, he becomes "a *malæ fidei* possessor." It was further said: "Our view is that, in order to deprive the occupant of land under color of title of the value of permanent improvements erected thereon, there must be brought home to him either knowledge of an outstanding paramount title, or some circumstances from which the court or jury may fairly infer that he had cause to suspect the invalidity of his own title, but that this cannot be inferred merely because it could have been demonstrated by the records of the county." "When the purchase is made under circumstances which would warrant the imputation of such [*crassa negligentia*] negligence to the purchaser, as if, for instance, a deed was received, without inquiry, from a mere stranger to the land, who had neither possession thereof nor any actual or apparent claim thereon, the claim of being a *bona fide* purchaser might well be rejected. But we do not think that such imputation can ever be predicated of a judicial sale because of defects in the title, where the land has been bought by a person disconnected with the proceedings, and with no actual notice or suspicion of the irregularities contained therein.

W. W. THORNTON.

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14 La. Ann. 1163; Guild v. Kield, 48 Mich. 307. Building over the boundary line by mistake: Gatlin v. Organ, 57 Tex. 11.

16 Miner v. Beekman, 50 N. Y. 337; Gillis v. Martin, 2 Dev. Eq. (N. C.) 470; Roberts v. Fleming, 53 Ill. 196; Benedict v. Gilman, 4 Paige, 58; Fogal v. Pirro, 10 Bosw. 100; s. c., 17 How. Pr. 113; Wetmore v. Roberts, 10 How. Pr. 51.

17 Bacon v. Cottrell, 13 Minn. 194.

18 Green v. Dixon, 9 Wis. 532; Harper's Appeal, 64 Pa. St. 315; Vanderhaise v. Hughes, 13 N. J. Eq. 410; Barnard v. Jennison, 27 Mich. 230; Green v. Westcott, 13 Wis. 606.

19 McSorley v. Larisson, 100 Mass. 270; Muckler v. Dillaye, 17 N. Y. 80.

20 Montgomery v. Chadwick, 7 Iowa, 114; Litton v. Litton, 36 La. Ann. 348; Roberts v. Fleming, 53 Ill. 196. As to a tenant at sufferance being allowed for improvements placed on the land, in good faith, to the extent paid due from him for the use of the land, see Dean v. Feeley, 69 Ga. 804.

21 Sugden on Vendors (7th London ed.), 720, citing Edlin v. Battaly, 2 Lev. 152; Peterson v. Hickman, 1 Ch. Rep. 8, cited; Whalley v. Whalley, 1 Vern. 484; Savage v. Taylor, For. 234; Baugh v. Price, 1 Wils. 320; *Ex parte* Hughes, 6 Ves, Jr. 617; *Ex parte* James, 8 Ves. Jr. 337; Browne v. Odea, 1 Scho. & Sef. 115. See 9 Madd. 412; 1 Barnard, Ch. Rep. 450; 1 Vern. 159; Shine v. Gough, 1 Ball & Beatty, 444.

22 721, citing Thomlinson v. Smith, Finch, 378.

23 721, citing Kenny v. Browne, 3 Ridgw. 518.

24 Witt v. Grand Gros, 55 Wis. 376; Gordon v. Tweedy, 74 Ala. 232; Hill v. Tissier, 15 Mo. App. 299; Stump v. Hornbeck, *Id.* 367.

25 Catterlin v. Armstrong, 79 Ind. 514.

26 Taylor v. Morgan, 86 Ind. 295.

27 Canal Bank v. Hudson, 111 U. S. 66; Chesround v. Cunningham, 3 Blackf. 82; Wernke v. Hazen, 32 Ind. 431; Graham v. Connersville, etc. R. Co., 36 Ind. 463; Westerfield v. Williams, 59 Ind. 221; Osborn v. Storms, 65 Ind. 321; McGill v. Kennedy, 11 Ind. 20; Adkins v. Hudson, 19 Ind. 392; Barker v. Owen, 93 N. C. 198; Templeton v. Cowry, 22 S. C. 389; Zwietusch v. Watkins, 61 Wis. 615; Hull v. Torens, 32 Minn. 527; Citizen's Bank v. Costenera, 62 Miss. 825; Jones v. Steam Stone Cutter Co., 20 Fed. Rep. 477; Page v. Freison, 74 Me. 512; Condry v. Cheshire, 88 N. C. 375; Wheeler v. Merriman, 30 Minn. 372; Coonrodt v. Myers, 31 Kan. 30. Such statutes are constitutional, even though they effect homestead rights: Justice v. Baxter, 93 N. C. 405; Fee v. Condry, 45 Ark. 410; s. c., 55 Am. Rep. 560.

28 Cole v. Johnson, 53 Miss. 94, following Green v. Biddle, 8 Wheat. 1; and adopted Canal Bank v. Hudson, 111 U. S. 66.

CARRIER — MERGER — BILL OF LADING — BREACH OF CONTRACT—DAMAGES.

HAMILTON V. WESTERN R. CO.

Supreme Court of North Carolina, June 3, 1887.

1. A bill of lading is only presumed to contain the contract of the carrier and shipper in relation to the transportation of the goods at the time of the shipment, and has no connection with a prior broken contract to furnish transportation.

2. Where the carrier agreed to have cars at a certain place and failed to have them there, and two days afterwards the goods were shipped and a bill of lading given, such bill of lading has no connection with the prior broken contract.

3. Where the carrier knows the existence of certain facts and that certain damages will result from his failure to furnish cars as agreed, such damages as actually occur from such known circumstances may be given by the jury.

SMITH, C. J., delivered the opinion of the court: The present action is prosecuted to obtain redress from the defendant company for an alleged breach of contract on its part, in refusing to receive at its station in Statesville, on Saturday, the 6th day of December, 1884, the day agreed on for the purpose, and thence transport two car loads of cattle to Richmond, in Virginia, intended to be sold for beef in that market on the Monday following. The cattle were put in cars on defendant's road on Monday, two days later, and conveyed and delivered in Richmond early on the morning of the next day. Compensation is demanded to cover the loss from diminished weight and impaired quality of beef, by the needless pulling the cattle in and taking them out of the cars on the day of the defendant's failure, for the loss of the best market day in selling, and for the expenses incurred in keeping the cattle at both places. The defendant denies that any contract was made other than that set out in the bill of lading annexed to the answer, which has been strictly performed, and that the attempt to have the cars loaded with the cattle, and attached to the train on Saturday as it passed eastward, failed by reason of the plaintiff's own negligence and delay in loading and having them in readiness for the train of that day, which could not wait for this to be done without hazarding the connection with the through train at Salisbury. The bill of lading is in the following form:

"WESTERN NORTH CAROLINA RAILROAD.
"NOTICE.

"Live stock will not be taken at reduced rates given, but will be charged full rates, unless the shipper and agent execute the following contract for the shipment of live stock:

"STATESVILLE STATION, December 8, 1884.

"Received by Western North Carolina Railroad Co., of Hamilton & Hardin, the following described stock:

CONSIGNEE AND DESTINATION.	DESCRIPTION.	STOCK.	WEIGHT.
A. G. Robinson, Richmond, Va.	1 car-load O. K. load and cont.	cattle east car	East 20,000 7,102

—Consigned as per margin, to be transported by Western N. C. R. R. Co. to freight station, Richmond, Va., ready to be delivered to the consignee or his order, to such company or carrier. If the same is to be forwarded beyond said station, whose line may be considered as part of the route to the destination of said stock, it is directly agreed that the responsibility of the Western N. C. R. R. as carrier shall cease at the aforesaid freight station, when delivered, or ready to be delivered, to such owner, consignee, or carrier upon the following conditions, viz:

"That whereas the Western N. C. R. R. Co., and connecting lines, transfer live stock only at certain tariff rates, except when, in consideration of a reduced rate, the owner or shipper assumes certain risks specified below: Now, in consideration of said railroad's agreeing to ship the above-described live stock at the usual reduced rate of $45 per car-load, to Richmond, Va., and a free passage to the owner or his agent on the train with this stock (if shipped in car-load quantities), the said owner and shipper does hereby assume and release the said railroad from all injury, loss, or damage, or depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring itself, or themselves, or each other, or in consequence of overloading, heat, suffocation, fright, violence, and from all other damages incidental to railroad transportation, which shall have not been caused by fraud, or gross negligence of said railroad companies. And it is further agreed that the said owner and shipper is to load, transfer, and unload said stock with the assistance of the company's agents or agent at his own risk; and it is further agreed that while the company's employees shall provide the owner or person in charge of the stock all proper facilities, on train and at stations, for taking care of the same, the business of the company shall not be delayed by the detention of trains to unload and reload stock for any cause whatever, but cars may be left at a station upon request of the person in charge of the same, to be forwarded by the next freight train, if he so directs; and the said owner and shipper hereby agrees that the said railroad company shall not be held liable for any damage or injury that may occur to said stock during the time the same may remain unloaded, and cut off the cars as aforesaid, and in case said stock is kept over at any given point by the said owner or shipper, his agent, beyond a reasonable length of time, for feeding and watering, subject always to local laws of any State through which it may pass while in transit, then this contract shall be held to be voidable at the option of these railroad companies, or either of them, in which such rates of freight may be imposed and collected by said companies as they, or either of them, may deem

proper, not to exceed local rates to such points of detention.

"It is further agreed and understood that the presentation of this bill of lading shall be sufficient evidence of ownership to relieve and release these companies from all liability on account of every delivery, but shall not be held to operate against the rights of these companies to demand, if they elect, the identification of the party presenting the bill of lading, before delivery of the said stock to him. And it is further agreed that, in case of accident to or delay of train from any cause whatsoever, the owner and shipper is to feed, water, and take proper care of stock at his own expense, or the company may do so at the expense of the owner. And it is further agreed that the owner and shipper, or his agent or agents in charge of stock, shall ride upon the freight train on which the stock is transported, and that he does assume and release said railroad companies from all risks of personal injury while about or upon the trains of the companies. And it is further agreed that, should damage occur for which the company may be liable, the value at the place claimed shall not exceed for a stallion or jack $200; for a horse or mule, $100; cattle, $20; other animals, $15 each. And it is further agreed that, when stock is shipped in less quantities than a car-load, the company's agent shall assess freight on the animal or animals at the following tariffs, and collect freight accordingly, regardless of what the actual freight may be, viz: Horses, mules, and horned animals estimated at 1,000 pounds each, and value limited at $100 each; jacks, stallions, and bulls estimated at 2,000 pounds each; hogs and calves may be estimated at 230 pounds each; hogs and calves in lots of five or more estimated at 200 pounds each; sheep and lambs in lots of five or more estimated at 100 pounds each.

"And this agreement further witnesseth that said owner and shipper has this day delivered to said company the live stock described above, to be transported on the conditions, stipulations, and understandings above expressed, which have been explained to, and are fully understood by, the owner and shipper.

[Signed] J. S. SCALES.

"Name of person in charge: HAMILTON & HARDIN, J. C. HARDIN. Owners and Shippers.

"Instructions to Agents and Conductors: Agents will indorse on this contract and copy name of person or persons in charge of stock. When so entered conductors of train carrying the stock will recognize and pass the parties, but they will not be recognized on any other train. The original contract, duly signed by shipper, must be given to the shipper of the stock, and a duplicate signed and marked 'duplicate' sent to the general claim agent."

ISSUES.

(1) Did the defendant contract with the plaintiffs as alleged in the complaint? *Answer.* Yes. (2) Did the defendant have knowledge of the object of the plaintiffs to have the cattle in Richmond, Va., on a particular day, as set out in the complaint? *A.* Yes. (3) Did the defendant fail to comply with the contract as alleged? *A.* Yes. (4) What damage, if any, have plaintiffs sustained by reason of the failure of their agents to comply with the contracts? *A.* Two hundred and fifty ($250) dollars. (5) After the contract made between the parties as alleged in the complaint, could the defendant have shipped the cattle beyond the North Carolina line, before Monday morning? *A.* Yes.

Judgment accordingly. Rule for new trial. Rule discharged. Judgment for the plaintiffs. Appeal prayed and granted. Notice of appeal waived. Appeal bond fixed at fifty ($50) dollars. Bond given in open court.

At the trial before the jury the plaintiffs proposed, and, after objection made and overruled, was allowed to prove, by the witness Hardin, that at the plaintiffs' instance he saw and applied to one Scales, an agent of the defendant at Statesville, for two cars to carry cattle to Richmond, as he wished to be present at the sales there on Monday, and was answered: "You know the rules of loading, and must be on time." That by daylight, on Saturday morning, the next day after the interview, the cattle were at the chute of place of loading, none of the company's servants up at the depot, except the night watchman; that, with such assistance as he could get, the cars were pushed up, one car filled and the other nearly loaded, when the train came; that the work of loading was hurried up and the cattle all put in, when the train moved and, without any attempt to attach the two cars, proceeded on its way and left them; that the cattle were then taken from the cars and kept over till Monday, when they were again put on the cars and carried to Richmond, reaching their destination early the next day. The plaintiff Hardin, testified to the same effect, as to getting the cattle on the cars, moving them to the chute for that purpose, and, just as the loading was finished and the cars ready, the starting of the train without them. Both witnesses testified to the damages from needlessly putting the stock in and taking them out of the cars, estimating the damage at from 50 cents to one dollar to each of the forty-nine animals sent. The other damages claimed were for expenses incurred by the delays at Statesville and Richmond before the next sale day, Friday, after their arrival. The testimony of the agent Scales, a witness for his principal, is that he made no contract for the transportation of the cattle, except that contained in the bill of lading, and this was with the plaintiff Hardin; that the witness Bledsoe came to his office on Friday, and asked for two stock cars, and witness said he had them; that Bledsoe remarked, "I will have two car-loads of stock to arrive that evening," not saying when or where he wanted them sent; that on same day one car was pushed up to the chute, and another near to it; that on Saturday morning plaintiff Hardin

came to witness and asked why his cattle were not sent; witness inquired if his stock were loaded, and the reply was, "Not quite," and the witness then said, "We never hold trains:" that this was between 7 and 8 o'clock; that the train from the west is due at 7 A. M., and usually waits three minutes, but this morning was delayed ten minutes. The engineer in charge of the train stated that when he started there were a dozen cattle still to put in the car at the chute, one hundred yards off over the track; but if loaded he could have attached the cars to the train in 15 or 20 minutes; and, if detained 20 minutes, would have missed connection with the Richmond and Danville train at Salisbury. The conductor testified that the last of the cattle were being put on the car "when we pulled out," and that the latest moment the train could wait, and not lose connection was 7:30. This is the substance of the evidence bearing upon the material matters in controversy, which are whether any contract was entered into before Monday; and, if so, upon whom rests the blame for the omission to convey the stock on the train of Saturday.

1. The facts in proof are, in our opinion, sufficient to warrant the finding that the defendant company did undertake to furnish the cars and transport the cattle on the Saturday following, which, if carried out in detail, would have been at the usual charge; or, if reduced rates was accepted, put in the form of the bill of lading afterwards issued. But it was not less an agreement, though arrested in its incipiency by the defendant's failure, if it can be properly attributed to it, to carry it out at the time fixed upon. The undertaking to have the car in readiness for the stock imposed an obligation to take the initiatory steps towards transportation, which was broken by its omission or neglect. The duty of putting the cattle on the cars devolved upon the plaintiffs; that of preparing and having them ready, on the company. If this were not so, no contract whatever would ever be formed until the issue of the bill of lading, while this only determines the conditions of the transportation after the cars pass under control of the company or its agents. This instrument regulates the time of the second or executed contract, of which no complaint is made; but that antecedent, broken by the neglect to forward on the Saturday before, is not merged in the latter, and its consequences averted. Indeed, the written instrument is but in execution of a preliminary agreement resting in parol and its consummation.

2. Was there such default on the defendant's part as to expose it to a claim for damages? From the defendent's own agent it appears that he was expecting the stock to arrive on Friday evening, and the cattle were there early the next morning, and no preparation seems to have been made by the company's agent to have the cars in readiness to receive them in time for the early train. They were, however, about loaded (some testimony affirming both cars loaded), when the train moved off. There were 20 minutes' time then to spare before it was necessary to leave, to insure connection at Salisbury. How long it would be necessary to wait to connect the cars with the train and prepare the necessary papers, does not appear, and, at least during this interval, no effort was made to accomplish the result. It was early in the morning, but the train was due early in the morning, and the plaintiffs were early at their work. They appear to have been in no default, and it would seem that equal promptness on the part of the company's employees would have insured the transportation. At least, the jury might so reasonably infer from the facts detailed, and thus place the blame of miscarriage of the arrangement upon the defendant and its servants.

This disposes of the alleged error in regard to the refusal of instructions requested upon the question of the existance and validity of the contract, and those only remain to be considered which relate to the measure of damages. The controversy upon this inquiry is confined to such as are claimed to result from the defendant's failure to have the cattle in Richmond on Monday, in time for the sales of that day, and the consequent loss of a favorable market. The extent of the loss is not shown in the evidence, and we must assume, if any damages were added on this account, they were in accordance with the proofs; and thus is drawn in question the charge of the court as to the consideration and allowance of the claim for any. Upon this point the instruction given is in these words: "If you find that Monday was a sale day, and the best sale day, when plaintiffs' beef cattle could have been sold to the best advantages, and the plaintiffs wished their cattle to be in Richmond on that day, and this was known to defendant, and was in view of both parties when the contract was made, the plaintiffs would be entitled to such special damages as actually result to the plaintiffs from these special circumstances." This is in response to the defendant's prayer for an instruction which proposed to limit the recovery to the difference in the value of the cattle (that is, in deterioration and change in the market, as we understand) when they ought to have arrived, according to contract, and did arrive, whereof no proof had been given; and, secondly, that special damages for loss of a bargain are not recoverable, unless the carrier knew all the circumstances, and agree to deliver them at a day certain, and knew that Monday was sale day for cattle at Richmond. The finding on the second issue seems to cover the point, and brings home to the defendant's agent a knowledge of the fact; and while the issue is in terms very general, no objection to its form was made, as not presenting it to the jury.

The manner in which the jury were charged, in regard to such additional damage, is in accord with the ruling in Lindley v. Railroad Co., 88 N. C. 547, and furnished no cause of complaint to the applicant. No error.

NOTE.—The principal question involved in the above case is, Are all the contracts and arrangements existing and made by and between the parties in the

relation to the shipment of certain articles and the time of their shipment conclusively presumed to be merged and contained in the bill of lading which is issued on their final shipment? For if such arrangements or contracts are merged into the written contracts, evidenced by the bill of lading, no parol evidence would be admissible of any negotiations or arrangements which might have occurred between the parties prior to the issue of such bill.

A bill of lading is treated as either a contract or as a receipt, or perhaps, more correctly, both purposes of a contract and a receipt.

As a contract, it is an evidence of the terms and conditions, arrangements, etc., between the owner of the goods and the carrier. As a receipt, it shows and is an evidence that certain goods were received by the carrier from the owner.

As a contract, it is well settled, as a general rule, that contemporaneous and prior negotiations cannot be shown to vary or contradict the written or printed bill of lading. They are regarded as merged in the bill.[1]

The parties have presumed to have written all that they deemed necessary to give full expression to their intention. Thus, where it was not claimed that there was anything on the face of the instrument which required the master of the vessel to take the inside rather than the outside route from New York to Baltimore, there could be no proof allowed of a preliminary conversation to establish such an obligation.[2]

But a bill of lading containing a modification of a verbal contract, previously made by the parties and accepted by the shipper without noticing the changes, does not supersede the prior verbal contract, which may be proved against the carrier by the shipper.[3]

In a Pennsylvania case,[4] it was held that where a bill was signed in the usual form and certain verbal arrangements as well were made at the time, both should be submitted to a jury to discover the contract.

Parol evidence is, however, admissible to explain the bill when it is ambiguous.[5]

And where there are written and printed clauses in a bill, which are at variance with each other, the written portions must prevail, and only so much of the printed matter in the printed blank form as is consistent therewith will have effect; all the rest is to be rejected.[6]

As a receipt, a bill of lading is only *prima facie* evidence of the truth of the statements contained in it. And its recitals are susceptible of explanation, of modification and contradiction, by parol evidence.[7]

And it is competent for the carrier to show that the shipper had no such goods as those recepted for, or that having the goods they were never delived to the carrier.[8]

Then from the above authorities it will be seen that, unless an exception was to be made and a new rule was to be established, if the contract to furnish the cars as was shown, and to ship the stock prior to the time when it actually was shipped, was merged into the written or printed contract contained in the bill of lading, all parol evidence in reference to such prior arrangements was inadmissible.

But why should the contract to furnish cars be merged into a contract to carry, etc. In order to have a clear understanding of this it will be well for us to consider the definition of a bill of lading as defined by our various courts. In the Supreme Court[9] of the United States, it was defined to be "a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported, on the terms therein expressed, to the described place of destination, and there delivered to the consignee or the parties therein designated;" By another court that "it is the written evidence of the contract between the owner of the goods and the master or owner of the vessel for the carriage of the article;"[10] or that it "is a formal acknowledgment of the receipt of the goods and an engagement to deliver them to the consignee or his assigns."

I can see no ground whatever for considering the transactions which occurred between the parties on Saturday, the 6th inst., to be merged in that which was began and consummated on the following Monday. The failure to furnish cars on that day had nothing to do with the shipment of the cattle on Monday. The bill of lading had nothing to do with the transaction on Saturday. It would be a queer rule which would hold that if the railroad company would break its contraction one day, that if at any succeeding day the shipper should happen to ship the same articles, the railroad company, that it would escape all liability for the wrong it had committed by issuing a bill of lading for the articles. Such a doctrine would simply be absurd. I have been unable to find any case similar to the principal one on this question, but there cannot be a shadow of a doubt but that the court was right in its holding that the bill of lading had nothing whatever to do with the breach of the Saturday contract and that it was not merged into the bill of lading, and that therefore parol evidence was admissible to establish the contract made on Saturday.

Carriers Liability Arising From Delay.—Where the carrier makes an express contract for a delivery within a specified time, he is bound to the fulfilment of that contract, and is liable from whatever cause the delay may have arisen.[12] There is no rule of law which specifi s the time within which the delivery must be made unless the contract was express. A promise to carry and deliver within a reasonable time will, however, always be implied.[13]

In McGraw v. Baltimore R. R. Co.,[14] Pattton, J., says: The obligation of the common carrier is to transport the goods safely and within a reasonable time.

1 The Delaware, 14 Wall. (U. S.) 579; Long v. N. Y. C. R., 15 N. Y. 76; Shaw v. Gardner, 12 Gray, 488; Arnould v. Jones, 26 Tex. 335.

2 White v. Van Kirk, 25 Barb. 16; White v. Ashton, 51 N. Y. 280.

3 M. P. R. Co. v. Beeson, 30 Kan. 208.

4 Union T. Co. v. Riegel, 23 P. F. Smith (Pa.), 72. See Atwell v. Miller, 11 Md. 357.

5 The Delaware, 14 Wall. 579; Am. Ex. Co. v. Lesem, 39 Ill. 312.

6 Miller v. H. & St. J. R. Co., 24 Hun, 607; Babcock v. L. S. M. R. Co., 49 N. Y. 491.

7 Witzler v. Collins, 70 Me. 290; The Lady Franklin, 8 Wall. 325; Glass v. Goldsmith, 22 Wis. 488; Myer v. Peck, 28 N. Y. 590.

8 The Schooner Freeman, 18 How. 182; Sears v. Wingate, 3 Allen, 103.

9 The Delaware, 14 Wall. 579.

10 Creery v. Holly, 14 Wend. 28. 282.

11 Cope v. Cordova, 1 Rawle (Pa.), 203. For other judicial definitions, see Empire Trans. Co. v. Wallace, 68 Pa. St. 302; Merchants' Bank v. Hewitt, 3 Iowa, 93; Covill v. Hill, 4 Denio, 323; Babcock v. May, 4 Ohio, 346; Davis v. Bradley, 28 Vt. 124.

12 Harmony v. Bingham, 1 Duer (N. Y.), 209; The Harriman, Wall. 161; Wood v. Chicago, etc., 24 Am. & Eng. Ry. Cas. 91; Kowles v. Dabney, 105 Mass. 437.

13 Mann v. Birchard, 40 Vt. 326; Parsons v. Hardy, 14 Wend. 215; McLaren v. Detroit, etc., 23 Wis. 138; Illinois C., etc., 41 Ill. 73.

14 18 W. Va., 361; s. c., 9 Am. & Eng. Cas. 188.

What is a reasonable time, is not susceptible of being defined by any general rule; but the circumstances of each particular case must be adverted in order to determine what is a reasonable time in that particular case: but it may be said that the mode of conveyance, the distance, the nature of the goods, the season of the year, the character of the weather, and the ordinary facilities of transportation are to be considered in determining whether in a particular case there has been an unreasonable delay. The question as to the carrier's diligence and reasonable time is a question for the jury.[15]

In Wisconsin, it was held that the railroad company as a common carrier, and independent of any contract between it and the shipper, is not liable for the loss and expense occasioned by its failure to have cars in readiness to ship live stock on the day that the consignor notified the agent of the company that he would tender them for shipment, when it is not shown that the notice given was "a reasonable notice," within the meaning of the statute, or what was the general custom of the company as to receiving and shipping live stock.[16]

Damages From Delay.—When a common carrier fails to transport goods to the point of destination, the damages usually recovered are the value of the goods at that point with interest from the time they should have been delivered, less the amount of the freight.[17] When the goods are unreasonably delayed the measure of damages is the difference between the market value of the goods at the time they should have arrived and the time at which they actually did arrive with interest from the former date.[18]

The measure of damages for the breach of the contract to transport goods, where they have never been taken into the carrier's possession, is the difference between the value of the goods at the time they were to have been delivered at the point of destination and the value of goods of the same quality at the same time in the same place of shipment, together with interest on said amount from the time the goods should have arrived, less the cost of transportation.[19]

From the authorities it would seem that the charge of the court in the principal case passed upon was decided in accord with the decisions generally.

WM. M. ROCKEL.

[15] Hales v. London, etc. R., 32 L. J. Q. B. 292.

[16] Richard v. Chicago, etc. R. Co., 18 Am. & Eng. Cas. 530.

[17] Erie R. Co. v. Lockwood, 28 Ohio St. 358; Robinson v. Merchants' Dispatch Co., 45 Iowa, 470; Louisville R. Co. v. Mason, 11 Lea (Tenn.), 116; Quaries v. Baltimore R. Co., 20 W. Va. 424; S. & N. Alabama R. Co. v. Wood, 72 Ala. 451; Perkins v. R. Co., 47 Me. 573; Gray v. Packet Co., 64 Mo. 47; Sturges v. Bissel, 46 N. Y. 462.

[18] Sisson v. C. & T. R. Co., 14 Mich. 489; The Vaughn and Telegraph, 14 Wall. 258; Illinois C. R. Co. v. McClelland, 54 Ill. 58; Scott v. Boston, etc. R. Co., 106 Mass. 468; Faulkner v. South. Pac. R. Co., 51 Mo. 311; Blumethal v. Bernard, 38 Vt. 402; Ringold v. Haven, 1 Cal. 108; Bailly v. Shaw, 24 N. H. 297; Michigan, etc. R. Co. v. Carter, 13 Ind. 164; Kansas Pac. R. Co. v. Reynolds, 8 Kan. 623.

[19] Am. & Eng. Ency., vol. 2, p. 906; Harvey v. Connecticut, etc. R. Co., 124 Mass. 421.

WEEKLY DIGEST

Of ALL the Current Opinions of all the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States.

1. ABATEMENT — Damages — Tort—Statute.——Under the laws of Maryland, an action for damages cannot be maintained against the executor or administrator of a party charged with libel, slander, assault and battery or other tort. Such action abates upon the death of the alleged wrong doer.—*Ott v. Kaufman*, Md. Ct. App., Dec. 9, 1887; 11 Atl. Rep. 580.

2. ACCOMPLICE — Evidence — Criminal Practice.—— Where the statute of a State renders the evidence of an accomplice uncorroborated, incompetent, and it appears that parties who were indicted with the defendant, and the prosecution against them dismissed, because they were not participants in the crime: *Held*, that they were not accomplices but competent witnesses.—*Sizeworth v. Commonwealth*, Ky. Ct. App., Dec. 17, 1887; 6 S. W. Rep. 123.

3. APPEAL—Abstract—Argument.——When a case is presented without abstract or argument, and no error is found in the record, the judgment will be affirmed.—*State v. Stubbs*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 521.

4. APPEAL—Assignment of Errors —Sufficiency.—— Unless the assignment of errors is as specific as the case will allow, they must, under Iowa lay, be disregarded.—*Wadsworth v. First Nat. Bank*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 504.

5. APPEAL—Assignment of Errors—Waiver.——Where an appellant assigns an illegal error and omits to refer to it in his brief, he will be held to have waived the error so omitted.—*Hunshew v. State ex rel.*, S. C. Ind., Dec. 7, 1887; 14 N. E. Rep. 365.

6. APPEAL—Bond—Sufficiency.——An appeal bond, which covers the provisions of the statute, is good, though it does not use the exact words of the statute. If there is only one surety, the appellee may waive the

necessity for another, or it may be amended or a new one given.—*Riley v. Mitchell*, S. C. Minn., Dec. 16, 1887; 35 N. W. Rep. 472.

7. APPEAL—County Court—Special Proceeding—Statute.——Construction of New York statutes relative to appeals in special proceedings in county courts.—*Ithaca, etc. Works v. Eggleston*, N. Y. Ct. App., Nov. 29, 1887; 14 N E. Rep. 312.

8. APPEAL — Cross-appeal — Supersedeas.——Where an appeal has been granted, and a cross-appeal is asked for, the bond and supersedeas must be approved by the court while in session, and not by the clerk after the adjournment.—*Covington, etc. Co. v. Piel*, Ky. Ct. App., Dec. 17, 1887; 6 S. W. Rep. 122.

9. APPEAL —Errors — Record.——Where the errors assigned on appeal do not appear in the record, they will be disregarded.—*Leach v. Lothian*, S. C. Colo., Nov. 18, 1887; 15 Pac. Rep. 816.

10. APPEAL—Interlocutory Judgment.——When, in a summary application to assess damages for constructing a railroad, the plaintiff's rights are denied and the court decides in favor of the plaintiff, no appeal can be taken till final judgment on the report of the commissioners.—*Hendricks v. Carolina, etc. R. Co.*, S. C. N. Car., Dec. 19, 1887; 4 S. E. Rep. 184.

11. APPEAL — Notice — Limitations.—— Where the notice of the order and its entry do not show the address of the attorney serving it, it is ineffectual to limit the time of appeal.—*Forstmann v. Schulting*, N. Y. Ct. App., Oct. 25, 1887; 14 N. E. Rep. 190.

12. APPEAL—Procedure—Statute.——Under the laws of Maryland and the procedure prescribed by the court of appeals, the record of a judgment appealed from must be filed within three months after the order is granted allowing the appeal.—*Gamble v. Sentman*, Md. Ct. App., Dec. 15, 1887; 11 Atl. Rep. 584.

13. APPEAL —Remand — Trial.——Where a case or repeal is remanded with directions as to the decree to be entered, questions properly before the appellate court cannot be again raised and argued on the rehearing, and evidence must be confined to the issue the court is to determine.—*Mix v. People*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 209.

14. ASSUMPSIT — Privity — Notice.——An action of *assumpsit* cannot be maintained, for goods ordered by one and supplied by another party, unless notice is given to the purchaser before appropriation of the goods.—*Barnes v. Shoemaker*, S. C. Ind., Dec. 7, 1887; 14 N. E. Rep. 367.

15. ATTACHMENT—Conversion—Intervenor.——When an officer sells property seized by him under a writ of attachment, there is sufficient evidence of a conversion, when the property is subsequently adjudged to belong to an intervenor.—*Schluter v. Jacobs*, S. C. Colo., Nov. 18, 1887; 15 Pac. Rep. 813.

16. ATTACHMENT—Priority—Parties.——One who has obtained an injunction against defendants, proceeding by attachment in a certain court against a common debtor of both parties, and the injunction is dissolved and a judgment rendered in favor of such defendant, with the consent of the common debtor, and against him, is not a party or privy to those proceedings, in such a sense as will preclude him from contesting the validity of such judgment.—*Blankenship v. Wartelsky*, S. C. Tex., Dec. 2, 1887; 6 S. W. Rep. 140.

17. BANKRUPTCY—New Promise—Fraud.——A debt is revived by a promise to pay it, made after the agreement of composition in bankruptcy and before the discharge, if made to induce a creditor to agree to the composition, it is a fraud on the other creditors, and is void.—*Carey v. Hess*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 235.

18. BENEVOLENT SOCIETIES — Divorce.——Where a wife, who is designated as a beneficiary of a benevolent society, obtains a divorce from her husband, who had so designated her, she uses by the divorce the benefit of being such a beneficiary.—*Tyler v. Odd Fellows, etc. Assn.*, S. J. C. Mass., Oct. 20, 1887; 5 N. Eng. Rep. 191.

19. BILLS AND NOTES — Confidential Relations.—— Where a father gives his notes to his son, who was also his trustee under an assignment for the benefit of creditors, the son must prove the consideration therefor.—*Huffman v. Iams*, S. C. Penn., October Term, 1887; 11 Atl. Rep. 444.

20. BILLS AND NOTES—Non-negotiable—Action by Assignee.——One holding a non-negotiable note by indorsement of the payee can sue on it.—*Rising v. Teabout*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 499.

21. BONDS—Municipal—Election—Notice.——A notice of an election to be held to determine upon the issuance of bonds by the town of Greensboro, under the act of December 24, 1886, was *held* insufficient because it did not comply with § 538 of the code.—*Bowen v. Greensboro*, S. C. Ga., Dec. 8, 1887; 4 S. E. Rep. 159.

22. BOND—Guardian and Ward — Recovery.——In a suit by one ward on a bond given by their guardian for three wards, a recovery can be had not to exceed one-third of the penalty, regardless of what has been recovered by the other wards thereon.—*Edmonds v. Edmonds*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 505.

23. BOND—Official Bond — Executor — Practice.—— When, in New Jersey, an executor's bond has become forfeited, it is the duty of the ordinary to cause suit to be instituted and prosecuted upon it, and the prosecution of such suit is a matter within the sound distretion of the ordinary.—*In re Lee*, N. J. Prerog. Ct., Nov. 15, 1887; 11 Atl. Rep. 124.

24. CARRIERS—Negligence—Passenger.——Where one entitled to transportation seats himself upon the footboard of the engine by invitation and direction of the carrier's servant, if the position is one of unusual peril, the defendant is required to exercise a degree of care commensurate with the danger.—*Lake Shore, etc. R. Co. v. Brown*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 197.

25. CARRIER — Passenger.——A passenger who, by mistake, enters the wrong train, is entitled to full protection by the servants of the carrier while upon that train and in alighting from it.—*Cincinnati, etc. Co. v. Carper*, S. C. Ind., Dec. 11, 1887; 14 N. E. Rep. 352.

26. CARRIERS—Refusal to Carry—Delivery.——A carrier is not liable for faliure to furnish cars and transport goods, unless they are offered at its regular place for receiving them, but refusal to furnish cars when goods are so placed, relieves the shipper from the necessity of making any further offer of delivery.—*Louisville, etc. R. Co. v. Flannagan*, S. C. Ind., Dec. 8, 1887; 14 N. E. Rep. 370.

27. CARRIERS—Written Contract—Bill of Lading.—— n an action to recover for a loss of goods by a carrier, it is *held* that a bill of lading is a written contract for carriage, binding upon the parties, and cannot be altered by oral agreement.—*Hostetter v. Baltimore, etc. Co.*, S. C Penn., Nov. 7, 1887; 11 Atl. Rep. 609.

28. CHATTEL MORTGAGE—Taking Possession—Tender ——By taking possession under a provision in a chattel mortgage prior to the maturity of the debt, the mortgagee confers upon the mortgagor the right to pay the debt. If the mortgagor tenders the debt and keeps his tender good till the trial, the mortgagee is guilty of a conversion in taking the goods and selling them.—*Rice v. Kahn*, S. C. Wis., Dec. 13, 1887; 35 N. W. Rep. 465.

29. CONSTITUTIONAL LAW—Bribery—Witness — Immunity from Prosecution.——The article in the Penal Code of New York, making it compulsory upon persons concerned in bribery cases, to testify in investigations on that subject, but exempts them from all liability, civil or criminal, incurred by reason of such testimony, is constitutional.—*People v. Sharp*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 319.

30. CONSTITUTIONAL LAW—Special Legislation.——A statute which is general in its nature, and which applies to all the State, except to the subject-matter of certain special statutes enacted prior to the adoption of the constitution, which forbids special legislation, is valid, and not repugnant to that constitution.—*Evans v. Phillipi*, S. C. Penn., Oct. 17, 1887; 11 Atl. Rep. 630.

31. CONSTITUTIONAL LAW — Police Power. —— Construction of Pennsylvania statutes relative to the adulteration of dairy products. They are held to be a proper exercise of the police power of the State, and not repugnant to the constitution of the United States. —*Walker v. Commonwealth*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 623.

32. CONSTITUTIONAL LAW—Special Statute.—A statute enacted in New Jersey, imposing certain duties on counties, but excepting one county from its operation, is unconstitutional.—*State v. Board, etc. Hudson City*, S. C. N. J., Nov. 8, 1887; 11 Atl. Rep. 135.

33. CONTRACT—Abandonment—Burden of Proof.—— Where two parties jointly buy land, and one of them sells the land at a profit, he is bound to account to the other for his share of the profit. If he sets up an alleged abandonment of the contract, the burden of proof is on him to sustain his allegation.—*Stevens v. Ross*, N. J. Ct. Chan., Nov. 1, 1887; 11 Atl. Rep. 114.

34. CONTRACT—Agent.—— Where a husband, acting as agent for his wife, says he will see the debts of the firm paid: *Held*, under the circumstances of the case, he is to be regarded as having spoken these words in his capacity as agent, and not to be personally liable therefor.—*Perry v. Brown*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 289.

35. CONTRACT—Agreement—Consideration — Landlord and Tenant.——Where a tenant agrees, in writing, for the consideration of one dollar, the receipt of which is acknowledged, that the landlord may make certain improvements, and then sues him for injuries and losses suffered thereby, the landlord is liable, if the evidence shows that no such consideration was received by the tenant.—*Fargis v. Walton*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 303.

36. CONTRACT— Damages. —— Where the defendant agreed to buy of plaintiff at list prices, and was furnished an article of the first quality for a season, and afterwards an article of the second quality, he is liable for the price of the first quality for all of that quality which he received, and for that of the second quality according to the value of the quality.—*Appeal of Brush, etc. Co.*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 654.

37. CONTRACT —Building Contract. —— Where, by a building contract, it was agreed that extra work should be paid for upon the architect's valuation, and it appeared that he had given different valuations to each of the parties: *Held* that, which valuation was correct, was a question for the jury.—*Keystone, etc. Co. v. Walker*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 650.

38. CONTRACT—Statute of Frauds—Part Performance—Injunction—Parol Contract.——Where, by parol contract, defendant agreed to devise certain lands to plaintiff, and plaintiff entered upon the performance of his part of the contract, and defendant afterwards sold the land: *Held*, that plaintiff was entitled to an injunction to prevent the conveyance of the land.—*Pflugar v. Pultz*, N. J. Ct. Chan., Nov. 14, 1887; 11 Atl. Rep. 123.

39. CORPORATION.——One who subscribes to the capital stock of a corporation is not relieved from his liability because all the stock of the corporation under a subsequently granted charter is not taken.—*Belton, etc. Co. v. Sanders*, S. C. Tex., Nov. 29, 1887; 6 S. W. Rep. 134.

40. CORPORATION—Cemetery — Taxation. —— Where the charter of a cemetery corporation provides that the cemetery property shall not be subject to taxation except at the will of the chosen freeholders of the county: *Held*, that the power conferred upon the chosen freeholders is either a delegation of the power to tax, which is unconstitutional, or at any rate is repealable.—*State v. Mayor, etc. of Newark*, S. C. N. J., Nov. 8, 1887; 11 Atl. Rep. 147.

41. COSTS—County—Criminal Cases. —— Neither the county commissioners nor any judge can, in Indiana, tax the costs of the court in a criminal case against a county.—*Ex parte Harrison*, S. C. Ind., Nov. 28, 1887; 14 N. E. Rep. 225.

42. CORPORATIONS—Service of Process— Repeal.—— Section 30 of act of March 14, 1877, was repealed by act of March 17, 1887, relative to service of process on corporations.—*Little, etc. Co. v. Lightbourne*, S. C. Colo., Nov. 18, 1887; 15 Pac. Rep. 785.

43. CORPORATIONS—Subscription—Liability.—— Where parties subscribe for stock, agreeing to pay by installments, as ordered by the directors, and, when forty per cent. is paid in, full paid stock is to be issued to them, they are still liable for sixty per cent., after the forty per cent. is paid in.—*Great Western T. Co. v. Gray*, S. C. Ill., Nov. 9, 1887; 14 N. E. Rep. 214.

44. COUNTIES—Creation of—Statute.——Construction of New Jersey statutes relative to the formation of new counties and the powers conferred upon such counties. —*State v. Board, etc. Union City*, S. C. N. J. Nov. 8, 1887; 11 Atl. Rep. 143.

45. CRIMINAL LAW—Evidence—Practice.—— Where a receipt is admissible in evidence in a criminal case, and is in the possession of the defendant and his counsel, they will be compelled to produce it.—*Commonwealth v. Shurn*, S. J. C. Mass., Oct. 20, 1887; 5 N. Eng. Rep. 170.

46. CRIMINAL LAW—Indictment—Fornication. —— In an indictment, under Indiana law, for decoying or compelling a female under eighteen years of age to have sexual intercourse with another, it is not necessary to state the name of the person.—*Stevens v. State*, S. C. Ind., Nov. 30, 1887; 14 N. E. Rep. 251.

47. CRIMINAL PRACTICE—Agreement to Discharge.—— To an information for adultery, a woman set up as a defense that the prosecuting attorney had agreed to continue to a certain time the case against her paramour for the same acts, and then under certain circumstances to discharge him: *Held*, that the agreement was void, and her answer was bad on demurrer.—*State v. Bain*, S. C. Ind., Nov. 28, 1887; 14 N. E. Rep. 232.

48. CRIMINAL PRACTICE—Appeal — Judgment. —— In Iowa, in appeal in a criminal case the abstract must show that a judgment has been rendered.—*State v. Briggs*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 521.

49. CRIMINAL PRACTICE—Grand Larceny—False Representations.——When, in an indictment for grand larceny, the charge is that the defendant obtained money by false and fraudulent representations, the jury is to determine whether the representations alleged were calculated to deceive.—*People v. Dimick*, N. Y. Ct. App., Oct. 4, 1887; 14 N. E. Rep. 178.

50. CRIMINAL PRACTICE—Witness—Indictment.—— It is not error to refuse to compel the prosecuting attorney to call a witness whose name is indorsed upon the indictment, nor to let the indictment go out with the jury with indorsements thereon of a previous trial, conviction and the granting of a new trial.—*Onofri v. Commonwealth*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 462.

51. DEED—Delivery.—— Where a deed is found among the papers of a decedent, which is shown to have been in accord with an understanding between him, his wife and his stepson (the grantee), and in satisfaction of the latter's demand upon him as guardian: *Held*, that it was a question for the jury whether the deed could be regarded as having been delivered.—*Stoney v. Winterhalter*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 611.

52. DEED—Fraud—Possession. —— Where a woman conveyed land, for love and affection, to her grandson, who, three days thereafter, conveyed it to the defendants, when she filed a bill to set aside her deed, as fraudulently obtained, alleging that, as she was notoriously in adverse possession, defendants were chargeable with notice of her rights: *Held*, that the consideration paid by defendants was not so grossly inadequate as to imply bad faith, and such possession was not notice of her claim as against her recorded conveyance.—*Hafter v. Strange*, S. C. Miss., Nov. 21, 1887; 3 South. Rep. 190.

53. DEED—Statute of Frauds — Covenant. —— In an action on a covenant of warranty, the defendant cannot prove by parol evidence that, at the time the contract was made, the plaintiff agreed to pay off the incumbrances as part of the consideration.— *Simanovich v. Wood*, S. J. C. Mass., Oct. 20, 1887; 5 N. Eng. Rep. 190.

54. DESCENTS—Advancements.—— Advancement is a question of intent, to be proved by the contemporary acts and statements of the parties —*Frey v. Heyat*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 534.

55. DEVISE—Shelley's Case.——A devise to A, and at her death to her child, children, or other lineal descendants, gives A an estate-tail.—*Mason v. Ammon*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 449.

56. DISTRICT ATTORNEY—Duties.——A district attorney cannot charge extra compensation for examining the books of county officials delivered by order of court to him for an investigation as to alleged irregularities. Besides, it is a question of law, and not for the consideration of the jury.—*Geiser v. Northampton Co.*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 507.

57. DIVORCE—Desertion—Justification.——Whenever a husband commits a matrimonial offense, which entitles his wife to a divorce, he does that which justifies his wife in leaving him.—*Weigand v. Weigand*, N. J. Ct. Err. & App., March Term, 1887; 11 Atl. Rep. 113.

58. DIVORCE—Suit Money.——In an application for a divorce, the wife is not obliged to prove she is entitled to a divorce to obtain an allowance for suit money. The amount thereof is a matter of discretion with the court. —*Campbell v. Campbell*, S. C. Iowa, Dec. 16, 1887; 35 N. W. Rep. 522.

59. DRAINAGE — Evidence—Practice.—— In order to present questions of evidence in drainage cases the motion must be made in the trial court.—*Racer v. Baker*, S. C. Ind., Dec. 1, 1887; 14 N. E. Rep. 241.

60. EASEMENT —"Appurtenances"— License.——Where a tenant has, by parol license, an easement of the use of water and his lessor sells the land with the "appurtenances," without mentioning the water easement: *Held*, that the easement does not pass to the purchaser by the deed and is not covered by the term "appurtenances."—*Root v. Wadhams*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 281.

61. EASEMENT—Landing on River—Obstruction—Logging.——One who obstructs the landing upon an navigable river owned by another person is liable to that person in damages for such obstruction. One has no right to float logs down the Connecticut river, except rafts.—*French v. Connecticut River, etc. Co.*, S. J. C. Mass., Nov. 23, 1887; 5 N. Eng. Rep. 294.

62. EASEMENT—Way—Possession.——A right of way claimed by prescription as appurtenant to an estate must have existed for twenty years and have one terminus on the estate. A private way cannot be obtained by prescription across a public highway as against the owner of the soil.—*Whaley v. Stevens*, S. C. S. Car., Dec. 12, 1887; 4 S. E. Rep. 145.

63. EJECTMENT—Adverse Possession—Jury.—Whether the adverse possession alleged in an action of ejectment is such as the statute of limitations requires, is a question for the jury.—*Mason v. Ammon*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 449.

64. EJECTMENT — Receiver.——A court cannot appoint a receiver to take charge of the land in controversy pending an action of ejectment.—*Oehme v. Rucklehaus*, S. C. N. J., Nov. 8, 1887; 11 Atl. Rep. 145.

65. ELECTION — Certification — Statute.——Construction of the statutes of Illinois regulating elections and the mode of certifying their results to the proper State and county officers.—*Wools v. First Nat. Bank of Jeffersonville*, S. C. Ind., Dec. 1, 1887; 14 N. E. Rep. 255.

66. ELECTIONS — Procedure — Contest.——Construction of New Jersey statutes with reference to elections, and the procedure in contesting them, of city officers of the city of Newark.—*State ex rel. v. Haynes*, S. C. N. J., Nov. 9, 1887; 11 Atl. Rep. 151.

67. EMBEZZLEMENT — Indictment — Description—Witness.——An indictment for embezzlement sufficiently describes the property in question by naming a certain number of "pairs of shoes." A defendant, examined as a witness, may be asked whether he did not lose money in stock-gambling after the alleged embezzlement.—*Commonwealth v. Shaw*, S. J. C. Mass., Nov. 23, 1887; 5 N. Eng. Rep. 303.

68. EMINENT DOMAIN — Compensation—Benefits.—— Compensation for land taken by eminent domain, except by a municipal corporation, must be ascertained and paid into court, before the land can be appropriated, and benefits received cannot be considered.—*Pacific, etc. R. Co. v. Porter*, S. C. Cal., Dec. 2, 1887; 15 Pac. Rep. 774.

69. EMINENT DOMAIN—Damages—Pleading.——Where, on appeal from the decision of viewers awarding damages for land taken by a railroad, the plaintiff files his narration in trespass *quare clausum fregit* and the defendant pleads not guilty, the rights of the parties can be fully decided.—*Cresson, etc. R. Co. v. Aunsman*, S. C. Penn., Oct. 31, 1887; 11 Atl. Rep. 561.

70. EMINENT DOMAIN — Jurisdiction.——Proceedings to assess damages to land caused by the construction of a railroad may be commenced in vacation or in term time, and in the latter case they are necessarily before the judge.—*Click v. Western, etc. R. Co.*, S. C. N. Car., Dec. 12, 1887; 4 S. E. Rep. 183.

71. EMINENT DOMAIN—Lis Pendens—Homestead.—— A notice of *lis pendens* in a condemation suit binds a wife, who subsequently claims a homestead in the premises.—*Roach v. Riverside W. Co.*, S. C. Cal., Dec. 2, 1887; 15 Pac. Rep. 776.

72. EQUITY—Cloud on Title—Fraud.——A bill in equity to remove a cloud on title cannot be maintained if the plaintiff is not in possession, unless he can prove that the judgment under which the defendant holds is fraudulent and collusive. — *Garnage v. Harris*, S. J. C. Me., Dec. 2, 1887; 5 N. Eng. Rep. 312.

73. EQUITY—Jurisdiction.——A court of equity has no jurisdiction to decide a question whether an alley belongs to the plaintiff or is, as alleged by the defendant, a common alley. The question is one of law, not of equity.—*Appeal of Quinn*. S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 649.

74. EQUITY—Jurisdiction.—— Where a bill in equity is filed to restrain the foreclosure of a chattel mortgage, and the answer of the defendant shows that the plaintiff has no equity, and that there is only one issue between the parties, and that triable at law, the bill must be dismissed. — *Browne v. French*, N. J. Ct. Chan., Dec. 1, 1887; 11 Atl. Rep. 606.

75. EQUITY—Reforming Deeds—Voluntary.——Equity will not reform a deed which is purely voluntary.—*Powell v. Morisey*, S. C. N. Car., Dec. 12, 1887; 4 S. E. Rep 185.

76. EQUITY — Surprise—Execution—Sale.——Circumstances stated under which a court of equity will relieve against an execution sale on the ground of surprise, the party being a German woman who knew very little English, and did not at all understand the proceedings against her.—*Schulling v. Liutner*, N. J. Ct. Chan., Nov. 5, 1887; 11 Atl. Rep. 153.

77. ERROR, WRIT OF—Discretion—Review.——The act of the court of common pleas, in refusing to allow the acknowledgment of a sheriff's deed and setting aside his sale, cannot be reviewed by the supreme court.—*Leonard v. Leonard*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 447.

78. EVIDENCE—Declarations.——The declarations of a person in possession of property, that she is to hold it during her life, and after her death it is to belong to Mr. M, are competent evidence against persons claiming under her.—*State v. City Council of Camden*. S. C. N. J., Nov. 8, 1887; 11 Atl. Rep. 137.

79. EVIDENCE — History. —— It is error to permit a party to read in evidence in support of his claim of title extracts from an historical work.—*Roe v. Strong*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 294.

80. EVIDENCE — Medical Book.——An extract from a medical book, if it has some bearing upon the question at issue, is admissible.—*Quackenbush v. Chicago, etc. R. Co.*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 523.

81. EVIDENCE — Pleading — Withdrawal.——The second paragraph of a complaint, withdrawn by the plaintiff, may be offered in evidence by the defendant, subject to the right of the plaintiff to explain or contradict its admissions.—*Baltimore, etc. R. Co. v. Evarts*, S. C. Ind., Dec. 7, 1887; 14 N. E. Rep. 369.

82. EVIDENCE—Previous Award. ——It is reversible error to allow a witness to tell the jury of an award previously made by arbitrators in the same case.—*Stryker v. Ross*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 510.

83. EXECUTION — Purchase Price of Property. —— Where an administrator makes a deed of property on the agreement of the purchaser to pay him personally and settles up the estate, such property is liable to be sold to pay the debt due him, under North Carolina law, since it represents the unpaid purchase money.—*Lawson v. Pingle*, S. C. N. Car., Dec. 19, 1887; 4 S. E. Rep. 188.

84. EXECUTOR—Action—Stay of Action—Practice.—— Circumstances stated under which it was held to be competent and lawful for the court to order a stay of an action brought upon an executor's land.—*In re Bond of Lee*, N. J. Prerog. Ct., Nov. 15, 1887; 11 Atl. Rep. 125.

85. EXECUTOR DE SON TORT. —— Where a creditor takes possession of the property of his deceased debtor under color of a bill of sale, and his title is disputed by a bill in equity, he is to be regarded as an executor *de son tort*, and his claim, if otherwise sustainable, must be postponed to the demands of other creditors.—*Baumgartner v. Haas*, Md. Ct. App., Dec. 9, 1887; 11 Atl. Rep. 588.

86. EXECUTORS—Estoppel—Laches.——Where an executor has made a final settlement, which has been acquiesced in by parties interested in the estate for eighteen years, such parties are estopped by their laches from contesting the settlement and asking that it be reopened.—*Yearly v. Cockey*, Md. Ct. App., October Term, 1887; 11 Atl. Rep. 586.

87. EXECUTORS—Pledge—Collateral. ——The pledgee of stock, with power to sell upon one day's notice, cannot appropriate the excess of the proceeds of such sale over the amount of the secured debt to the satisfaction of his unsecured demand, as against the executor of the insolvent pledgor.—*Peters v. Nashville, etc. Bank*, S. C. Tenn., Dec. 22, 1887; 6 S. W. Rep. 133.

88. EXECUTORS—Power—Mortgage.——When executors sell property under a power in the will, and take a mortgage to secure deferred payments, they are not liable for losses caused by the depreciation of the property mortgaged.—*Woodruff v. Lounsberry*, N. J. Ct. Err. & App., March Term, 1887; 11 Atl. Rep. 113.

89. EXECUTORS—Public Administrator—Citation.—— Where a party dying elsewhere leaves effects in New York, upon proper citation to the widow and next of kin the surrogate has jurisdiction to appoint the public administrator to administer, unless a widow or relative, who is properly qualified, is willing to do so, when such appointment should be made.—*In re Page* N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 193.

90. EXECUTORS — Sale of Realty — Setting Aside — Vendee's Lien.——When an administrator's sale of realty is confirmed by the court to the vendee, who subsequently sells it to A, and by suit against the parties the administrator's deed is afterwards set aside, A is entitled to a lien on the land for the money paid by him therefor.—*Stults v. Brown*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 230.

91. FALSE IMPRISONMENT—Arrest—Warrant.——Where one is arrested without a warrant on a charge of felony, he may maintain an action for false imprisonment; but if the arrest was made upon reasonable cause, the officer who made the arrest cannot be held liable for subsequent detention.—*Bath v. Metchalf*, S. J. C. Mass., Nov. 23, 1887; 5 N. Eng. Rep. 291.

92. FEDERAL QUESTION—Public Lands—Taxation.—— The United States, on March 2, 1861, relinquished its title to certain land in Iowa, in favor of certain *bona fide* purchasers: *Held*, that the decision of the Iowa courts, as to whether that land was taxable for 1861, was final and not reviewable.—*Stryker v. Crane*, U. S. S. C., Dec. 5, 1887: 8 S. C. Rep. 203.

93. FISHERIES——Indictment—Statute. ——Construction of New Jersey statutes relative to fisheries in that State. What is essential to an indictment under those statutes.—*State v. American, etc. Co.*, S. C. N. J., Nov. 8, 1887; 11 Atl. Rep. 127.

94. FRAUDS—Statute of—Contract.——A contract that is within the statute of frauds cannot be enforced, either directly or upon a *quantum meruit*.—*Freeman v. Foss*, S. J. C. Mass., Nov. 23, 1887; 5 N. Eng. Rep. 302.

95. FRAUDS—Statute of—Costs of Appeal.——When a party agrees to pay part of the costs of an appeal taken by one from a judgment against both of them, the promise does not come within the statute of frauds.—*Wilson v. Smith*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 506.

96. GAMING — Special Legislation.——An act against gaming on the first floor of a building in a county, where more than 1,500 votes were cast at an election, is constitutional, though it applies to only one county. — *State v. Donovan*, S. C. Neb., Nov. 22, 1887; 15 Pac. Rep. 783.

97. GUARANTY—Acceptance.——When a guaranty is absolute, notice of its acceptance by the guarantee is not necessary in order to bind the guarantor.—*Wise v. Miller*, S. C. Ohio, Nov. 22, 1887; 14 N. E. Rep. 218.

98. GUARDIAN AND WARD — Sale.——Circumstances under which the sale of a ward's land by order of a court will be approved.—*Neuner v. Neuner*, Ky. Ct. App., Dec. 17, 1887; 6 S. W. Rep. 122.

99. HIGHWAYS—Gravel Roads—Two Acts.——The acts of April 8, 1885, and §§ 5091, 5114, Rev. Stat. Indiana, 1881, provide different modes for the construction of gravel and macadamized roads, and both are in force.—*Ely v. Morgan Co.*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 236.

100. HIGHWAYS—Jurisdiction — Appeal.——In Maryland, the primary jurisdiction of matters relating to highways is vested in county commissioners, and from their decision an appeal lies to the circuit court. Its decision is final.—*Greenland v. County Commrs., etc.*, Md. Ct. App., Dec. 9, 1887; 11 Atl. Rep. 581.

101. HIGHWAYS—Petition—Collateral Attack.——When the county commissioners have decided relative to a free gravel road upon a petition presented to them, their decision cannot be collaterally attacked on the ground that there were not the requisite number of signers to the petition.—*Ely v. Morgan Co.*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 236.

102. HIGHWAYS—Statutes.——Construction of Pennsylvania statutes, relating to the procedure for laying of highways.—*In re Road, Upper St. Clair, etc.*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 625.

103. HIGHWAYS — Statute.——Construction of Maine statutes, relative to the laying out of highways and the authority to place gates across them.—*Blakeslee v. Tyler*, S. J. C. Me., Nov. 19, 1887; 5 N. Eng. Rep. 315.

104. HIGHWAYS—Statutes.——Construction of Maine statutes, general and special, relating to laying out highways.—*Wells v. City Commrs.*, S. J. C. Me., Nov. 29 1887; 5 N. E. Rep. 305.

105. HOMESTEAD—Pension—Constitutional Law.——A homestead purchased with pension money is not exempt from execution for a debt contracted prior to the purchase. The Iowa law making the exemption impairs the obligation of contracts.—*Foster v. Byrne*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 523.

106. HOMESTEAD — Setting Apart—Notice to Heirs. ——When the probate court sets aside a homestead to the widow without notice to the heirs, it is valid, though it is proved the homestead is worth twice the amount allowed, when no fraud is suggested.—*Kearney v. Kearney*, S. C. Cal., Jan. 27, 1887; 15 Pac. Rep. 769.

107. HOMICIDE — Murder — Evidence. —— Circumstances stated under which a homicide was held to be

murder, and evidence set forth which was held to justify a verdict to that effect.—*People v. Driscoll*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 305.

108. HUSBAND AND WIFE.—Bankruptcy.——Where a decree in bankruptcy authorize the assignee to convey land to the bankrupt he may have the deed made to his wife, and the assignee deed to the wife will be valid; the husband cannot, after the death of his wife, maintain an action of trespass against the devisees.—*Wilson v. Winslow*, S. J. C. Mass., Nov. 26, 1887; 5 N. Eng. Rep. 293.

109. HUSBAND AND WIFE—Curtesy—Desertion.——A husband is not entitled to an estate by the curtesy in the lands of the deceased wife, if he has deserted her; he is so entitled if the separation was voluntary and by mutual consent, the cause of the separation is a question of fact for the jury.—*Hart v. McGrew*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 617.

110. HUSBAND AND WIFE—Fraud—Trust.——Where a wife bought goods and paid for them in notes signed by her husband as her agent, and entered into an agreement with the vendor that her husband should manage the business of selling the goods at a fixed salary, and that after the payment of the notes the balance should be held in trust for her: *Held*, that the transaction was really between the vendor and the husband, and created no trust in favor of the wife, and was a fraud upon creditors.—*Vowinkle v. Johnston*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 634.

111. HUSBAND AND WIFE—Mortgage—Foreclosure.—Where husband and wife execute a note and secure its payment by mortgage on the wife's property, such mortgage will be foreclosed, although husband and wife deny that the debt is a joint one.—*Conway v. Wilson*, N. J. Ct. Chan., Dec. 14, 1887; 11 Atl. Rep. 607.

112. HUSBAND AND WIFE—Presumption of Ownership of Chattels.——Where a husband and wife are living together, the presumption of law is that the furniture and other chattels are the property of the husband. To rebut this presumption the wife must show a good title not derived from the husband.—*McDevitt v. Vial*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 645.

113. HUSBAND AND WIFE—Reducing to Possession—Mortgage.——Where a husband, as executor, receives money belonging to his wife, he will be presumed to have received it in his own right, and his mortgage, made many years after to his son and then assigned to his wife the day before he made a general assignment, is void against his creditors.—*Smock v. Jones*, N. J. Ct. Chan., Dec. 14, 1887; 11 Atl. Rep. 497.

114. HUSBAND AND WIFE—Separate Estate—Note.—A married woman is not liable on her note given for money borrowed to repair her separate estate and actually so applied.—*Sellers v. Heinbaugh*, S. C. Penn., Oct. 17, 1887; 11 Atl. Rep. 550.

115. HUSBAND AND WIFE—Separate Estate—Liability.——The separate estate of a married woman is not, under North Carolina laws, liable for goods supplied to her to conduct a boarding-house without the written consent of her husband.—*Clark v. Hay*, S. C. N. Car., Dec. 19, 1887; 4 S. E. Rep. 190.

116. HUSBAND AND WIFE—Surety—Mortgage.——In Indiana, by statute, a wife cannot mortgage her property to secure the debt of her husband. Where husband and wife held land by entireties and the wife mortgaged her interest, and it appeared by special finding that the mortgage was made to raise money for the husband, it was held that such finding did not warrant the conclusion that the wife executed the mortgage as surety, and that such mortgage was void.—*Bartholomew v. Pierson*, S. C. Ind., Nov. 30, 1887; 14 N. E. Rep. 249.

117. INDICTMENT — Pleading—Practice.——Objections to the constitution of the grand jury who found an indictment, or any member thereof, or to the form or substance of the indictment, must be made by proper plea and not by motion to quash.—*Ford v. State*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 241.

118. INJUNCTION — Laying Railroad — Title.——When the chief value in land is the gravel beneath its surface, and a railroad has graded its road over the land, and its agent has declared he will remove gravel therefrom, though the parties dispute the ownership, a preliminary injunction should issue against the laying of the railroad track, until the title is determined.—*Newall v. Staffordville G. Co.*, N. J. Ct. Chan., Dec. 14, 1887; 11 Atl. Rep. 495.

119. INJUNCTION—Mandatory—Easement.——A mandatory injunction may issue at the beginning of a suit to protect an easement or similar rights.—*Hodge v. Giese*, N. J. Ct. Chan., Dec. 9, 1887; 11 Atl. Rep. 484.

120. INFANT—Contract—Ratification.——In Maine, the contract of an infant, not for necessaries, can only be ratified, after majority, by a written instrument. An acknowledgment, indorsed on a note, of the payment of money is not such a ratification.—*Bird v. Swain*, S. J. C. Me., Nov. 30, 1887; 5 N. Eng. Rep. 309.

121. INN — Intoxicating Liquors — Witness. —— One who goes to an inn to procure liquor is not a guest. One who places curtains in his windows, to obstruct the view from without of the business conducted within the premises, violates the law. The jury is the sole judge of the credibility of witnesses.—*Commonwealth v. Moore*, S. J. C. Mass., Nov. 22, 1887; 5 N. Eng. Rep. 301.

122. INSURANCE—Cancellation—Notice to Broker.——Where a policy of insurance provides that notice of cancellation shall be given to the assured, and that if it was procured by a broker such broker shall be deemed to be the agent of the assured, a notice of cancellation given to such broker is invalid.—*Mutual A. S. v. Scottish U. & W. Ins. Co.*, S. C. App. Va., Dec. 1, 1887; 4 S. E. Rep. 178.

123. INSURANCE — Fire-works — Premises.——An insurance on a house, which forbids the keeping of fire-works on the premises, is not vitiated by the presence of fire-works in a building twenty-five or fifty feet distant.—*Allemania F. Ins. Co. v. Pitts Ex. Soc.*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 572.

124. INSURANCE — Life—Wager.——Where there is a great disproportion between the insurance taken out on the life of a debtor by his creditor and the debt, the court should declare the policy to be a wager as a matter of law.—*Cooper v. Shaeffer*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 518.

125. INSURANCE—Misrepresentations—Application.—An insurance company cannot defend against a suit on a life insurance policy, claiming misrepresentations in the application, under Iowa laws, when a copy of the application was not attached to the policy.—*Cook v. Federal L. Ass'n*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 500.

126. INSURANCE—Note for Premium—Notice.——Under the Iowa law, that no policy shall be suspended for non-payment of a note given for the premium till thirty-five days after written notice of the maturity of the note, the service of the notice is complete after a registered letter containing the notice has been mailed.—*McKenna v. State Ins. Co.*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 519.

127. IRRIGATION—Grant—Contract.——Where several parties agree to form a corporation and to dig a ditch across certain land, one party after dissolution of the company cannot dig the ditch across another's land.—*Stewart v. Stevens*, S. C. Colo., Nov. 18, 1887; 15 Pac. Rep. 786.

128. INSOLVENCY — Statute. —— Construction of insolvency laws of Vermont with reference to keeping books of account.—*Howard v. Leavit*, S. C. Vt., Oct. 13, 1887; 5 N. Eng. Rep. 105.

129. INTEREST—Rate of Interest.——Where no rate of interest is stipulated in a note, it bears interest after maturity at the rate of six per cent. per annum, falling within the provision of the statute which prescribes that rate of interest for "money due upon an instrument in writing."—*Gale v. Cory*, S. C. Ind., Dec. 2, 1887; 14 N. E. Rep. 362.

130. INTOXICATING LIQUORS – Election. —— Where a defendant was indicted for selling intoxicating liquors on a holiday, and the evidence showed a sale in the morning and one in the afternoon, it is held to be fatal error not to compel the prosecution to elect upon which sale it will rely to secure a conviction. — *Sebkovitz v. State*, S. C. Ind., Dec. 8, 1887; 14 N. E. Rep. 363.

131. INTOXICATING LIQUORS—Illegal Keeping.—— One who keeps liquors, intending to deliver them on an unlawful contract of sale, is subject to the provisions of a municipal ordinance prohibiting the keeping of liquors for unlawful sale.—*Griffin v. City of Atlanta*, S. C. Ga., March 9, 1887; 4 S. E. Rep. 154.

132. INTOXICATING LIQUORS — Statute. —— Construction of Massachusetts statute relative to the sale of intoxicating liquors. Sale to a club for distribution among its members.—*Commonwealth v. Ewig*, S. J. C. Mass., Oct. 20, 1887; 5 N. Eng. Rep. 177.

133. INTOXICATING LIQUORS — Statute. —— Construction of Massachusetts statutes relative to keeping for sale intoxicating liquors.—*Commonwealth v. Savery*, S. J. C. Mass., Oct. 21, 1887; 5 N. Eng. Rep. 186.

134. JUDICIAL SALES—Confirmation.——Construction of Pennsylvania statutes relative to the settlement of the estates of decedents, judicial sales of their property and confirmation of such sales.—*Arndt's Appeal*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 633.

135. JUDGMENT—Interest—Judgment Index. —Where the judgment index does not show that it bears more than six per cent. interest, while the appearance docket shows it was to bear eight per cent. a creditor of the debtor cannot object that eight per cent. is paid in distributing the debtor's assets, unless he shows that he was misled by the entry in the judgment index.—*Nicholson's Appeal*, S. C. Penn., Oct. 3, 1887; 11 Atl. Pep. 562.

136. JUDGMENT—Joint — Res Adjudicata.——Where a decree against one company to make switch connections and against another to allow them to be made is reversed on the appeal of the latter, the former cannot avail itself of the decree as *res adjudicata*.—*Pittsburgh, etc. R. Co. v. Reno*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 195.

137. JUDGMENTS — Presumption of Payment—Credits. ——Where credits are indorsed on a contract, and judgments have been obtained under the contract, which would be barred but for payments, the question whether those payments were made on the judgments, is for the jury.—*Jenkins v. Anderson*, S. C. Penn., Oct. 31, 1887; 11 Atl. Rep. 558.

138. JUDGMENT—Scire Facias— Set-off. —— Unsettled partnership accounts cannot be set-off in a *scire facias* to revive a judgment.—*Jenkins v. Anderson*, S. C. Penn., Oct. 31, 1887; 11 Atl. Rep. 558.

139. JURISDICTION—Justice of the Peace.——A justice of the peace has jurisdiction of an action for cutting growing trees, if the plaintiff has actual possession of the premises.—*State v. Stenner*, S. C. N. J. Nov. 8, 1887; 14 Atl. Rep. 131.

140. JUSTICE—De Facto.——The acts of a justice of the peace, who is defeated for re-election, and refuses to surrender his office or his books, are valid as to third parties.—*Hamlin v. Kassafer*, S. C. Oreg., Nov. 28, 1887; 15 Pac. Rep. 778.

141. JUSTICES—Jurisdiction—Torts.——Justices of the peace now have jurisdiction in cases of tort, when the damages claimed do not exceed $50.—*Harry v. Hambright*, S. C. N. Car., Dec. 19, 1887; 4 S. E. Rep. 187.

142. LANDLORD AND TENANT — Bonded Warehouse — Covenant—Lease.—— Where a lease for a building, used as a bonded warehouse, contained a covenant to pay rent for such time as the lessee might hold over beyond the term, and he held over for two months because the government would not remove within that time certain goods therein: *Held*, that the lessee was liable only for the two months' rent, under the terms of the lease, and not for a whole year.—*Pickett v. Bartlett*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 301.

143. LANDLORD AND TENANT — Repairs. —— Where a landlord contracts to make the necessary repairs, he is only bound to use due diligence in ascertaining when repairs are needed, and in making them.—*Frank v. Conradi*, S. C. N. J., Nov. 26, 1887; 11 Atl. Rep. 480.

144. LANDLORD AND TENANT——Tenements — Repairs. ——When a landlord leases a house to different tenants, retaining control of the halls and stairways, he is bound to exercise reasonable care in keeping them reasonably fit for their ordinary use, and is responsible to others for damages sustained by them from his failure so to do.—*Gilloon v. Reilly*, S. C. N. J., Nov. 26, 1887; 11 Atl. Rep. 481.

145. LEASE—Damages—Subletting.——Where a lease contained a covenant against subletting, and prescribed a penalty as liquidated damages for its infringement: *Held*, that a jury was justified, upon proof of such subletting, in finding for the plaintiff the stipulated damages.—*Miller v. Ranlan*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 615.

146. LEASES—Registration. —— The registry acts do not apply to leases. The first in date is first in right.—*Hodge v. Giese*, N. J. Ct. Chan., Dec. 9, 1887; 11 Atl. Rep. 484.

147. LIBEL—Pleading — Justification — Evidence.—— Where, in an action for libel, it is agreed that the same evidence may be given under the plea of not guilty, as would be admissible if justification had been pleaded, the court charged the jury that, under the plea of justification, the evidence must be as conclusive as would be necessary to convict if the case had been one of criminal prosecution: *Held*, to be erroneous.—*Woodrop v. Thacher*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 621.

148. LIMITATIONS—Acknowledgment.—— If a debtor acknowledges the debt within six years after it becomes due, and then acknowledges it within six years thereafter, and not more than six years before the bringing of the suit, the statute of limitations does not apply. It is not necessary that there should be a positive promise to pay.—*Detzel v. Shoemaker*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 637.

149 LIMITATIONS—Assignment— Acknowledgment.—— After the assignment of his property for his creditors, the debtor can, and he alone can, promise to pay a debt already barred, and remove the bar of the statute. —*Hellman v. Kiene*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 516.

150. LIMITATIONS—Corporation— By-laws.——The directors of a corporation cannot reply ignorance of the by-laws of that corporation to a plea of the statute of limitations filed by it in a cause in which such director is plaintiff and the corporation is defendant.—*Mutual, etc. Co. v. McSherry*, Md. Ct. App., Dec. 9, 1887; 11 Atl. Rep. 577.

151. LIMITATIONS—Penalty—Statute.——In an action for a penalty for selling intoxicating liquors to a minor, under the statute of Massachusetts, is barred after the lapse of one year.—*O'Connell v. O'Leary*, S. J. C. Mass., Nov. 23, 1887; 5 N. Eng. Rep. 296.

152. LIMITATIONS—Trust—Implied Trust.——Where a firm receives, in satisfaction of a demand, money which had been abstracted by its debtor from a public office, and fifteen years elapses before suit is brought, the firm can plead the statute of limitations, as it held the funds upon an implied, and not upon an express trust. —*Price v. Mulford*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 298.

153. LIMITATIONS — Usury—National Banks. —— The limitation of two years for a suit against a national bank for taking usurious interest begins to run from the payment of the interest.—*Carpenter v. National Bank*, S. C. N. J., Nov. 26, 1887; 11 Atl. Rep. 478.

154. LIMITATIONS—Written Promise to Pay. —— Where goods are contracted for by a written contract and promise to pay, the right of action for the price of the goods is only barred in ten years.—*Wing v. Evans*, S. C. Iowa, Dec. 13, 1887; 35 N. W. Rep. 495.

155. MANDAMUS—Judgment—Assignment. —— Where one is assignee of part of a judgment in favor of a city,

his title having accrued before the judgment was rendered, he is not entitled to a *mandamus*, directed to the city treasurer, requiring such treasurer to pay over to him his share of the money received by the city.—*Schuck v. City of Pittsburg*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 651.

156. MASTER AND SERVANT—Conduct of Business.——A servant cannot hold his master responsible for the latter's unsafe manner of doing business after he has knowledge of it.—*Hawk v. Penn. R. Co.*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 459.

157. MASTER AND SERVANT — Fellow-servant — Vice-principal.——Servants engaged in the same common work, and performing duties and services for the same general purpose, are fellow-servants, though one is inferior in grade or subject to the direction and control of another. When the master places one in entire charge of his business, or a distinct branch of it, exercising no discretion or oversight of his own, such party is a vice-principal, and not a fellow-servant. A train dispatcher is a vice-principal as to those moving the trains.—*Lewis v. Seifert*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 514.

158. MASTER AND SERVANT—Negligence—Leased Line.——When an employee is killed while his train is running on the track of another line, if the accident resulted from a defective car, the other line is not liable; if from a defective track, the other company is liable; if from both causes, the owner of the track is responsible in the proportion the defective track contributed to the injury.—*Augusta, etc. R. Co. v. Killian*, S. C. Ga., Nov. 22, 1887; 4 S. E. Rep, 165.

159. MASTER AND SERVANT—Unsafe Appliances.——A master is responsible in damages for injuries inflicted upon a servant by the enforced use of unsafe appliances. A baggage elevator in a hotel, unfit for the use of passengers, should not be used by the servants of the establishment, and the master is responsible if he requires them to ascend and descend in such elevator.—*McKinnie v. Kilgalon*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 614.

160. MECHANIC'S LIEN—Completion of Building.——A mechanic's lien, filed before the completion of the building, is, under California law, premature, and cannot be enforced.—*Roylance v, San Luis H. Co.*, S. C. Cal., Dec. 2, 1887; 15 Pac. Rep. 777.

161. MECHANIC'S LIEN—Husband as Contractor.——Where, in a mechanic's lien suit, a defendant claimed that she owned the property and let the contract to her husband, and the mechanic gave her no notice of the lien, but the evidence tended to prove that husband and wife jointly owned it, a judgment for defendant should be reversed.—*Rand v. Parker*, S. C. Iowa, Dec. 13, 1887; 35 N. W. Rep. 493.

162. MECHANIC'S LIEN—Leases.——An agreement allowing one to occupy so much land as may be necessary in finding and producing oil and minerals for twenty years, or as long as they use it for those purposes, is a lease, and is subject to a mechanic's lien, under the Pennsylvania law.—*McElwaine v. Brown*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 453.

163. MORTGAGE — Foreclosure. —— A mortgagor of land, in possession, has no right to cut and sell the hay after foreclosure.—*Perley v. Chase*, S. J. C. Me., Nov. 30, 1887; 5 N. Eng. Rep. 311.

164. MORTGAGE—Sale—Lien.—— Where land is sold under foreclosure of a mortgage for default on some of the notes, such sale exhausts the lien of the mortgage.—*Harms v. Palmer*, S. C. Iowa, Dec. 15, 1887; 35 N. W. Rep. 515.

165. MORTGAGE—Sales Under—Subrogation.—— Where a sale under one execution for several mortgages is invalid, the purchaser, who had paid the mortgages, is subrogated to the rights of the mortgagees.—*Brown v. Brown*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 507.

166. MORTGAGE—Tax-sale—Purchase by Mortgagee.—Where a mortgagee purchases the property at a tax-sale, when his mortgage gives him a right to pay the taxes, such title, though conveyed by him to another, cannot prevail over the mortgage lien, the judgment of foreclosure thereon having also been conveyed to a different party.—*Eck v. Swennenson*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 503.

167. MUNICIPAL CORPORATIONS—Bonds—Election.——A *mandamus* to compel payment of bonds authorized by vote prior to the taking effect of the act allowing the vote, will be refused.—*Santa Cruz W. Co. v. Kron*, S. C. Cal., Dec. 1, 1887; 15 Pac. Rep. 772.

168. MUNICIPAL CORPORATIONS—Streets—Damages.——Where a municipal corporation allows a party to move his canal from one street to another, and in so doing the flume of another party is destroyed, and his crops are thereby injured, the corporation is not liable for the damage.—*Sorenson v. Town of Greeley*, S. C. Colo., Oct. 18, 1887; 15 Pac. Rep. 803.

169. MUNICIPAL CORPORATIONS—Street Railways.——An under-ground railway, following the lines of streets in a city or village, is a street railway. The New York law of 1880, ch. 582, is unconstitutional.—*In re New York Dist. R. Co.*, N. Y. Ct. App., Oct. 4, 1887; 14 N. E. Rep. 187.

170. NEGLIGENCE — Comparative — Instructions.——Where there is evidence tending to show negligence by both parties, an instruction that, if the defendant's negligence was gross, and the plaintiff's was but slight in comparison, the plaintiff is not prevented by his negligence from recovering, is proper.—*Chicago, etc. R. Co. v. Warner*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 206.

171. NEGLIGENCE—Contributory Negligence—Instruction.——Circumstances stated under which a court properly refused to instruct the jury that the plaintiff was guilty of contributory negligence, and that their verdict should be for the defendant.—*Chautauqua Lake, etc. Co. v. McLuckey*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 616.

172. NEGLIGENCE—Contributory—Knowledge.——Because plaintiff had previous knowledge that a plank in a bridge was defective he was not thereby compromised, and the defendant could not relieve itself thereby from its own negligence, the plaintiff having been injured by stepping on that plank.—*Monongahela B. Co. v. Barard*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 575.

173. NEGLIGENCE—Contributory—Railroad.——When a party is injured by fire starting from the defendant's right of way, the fact that he failed to protect his haystacks by plowing around them is no defense against the defendant's negligence.—*West v. Chicago, etc. R. Co.*, S. C. Iowa, Dec. 13, 1887; 35 N. W. Rep. 479.

174. NEGLIGENCE—Master and Servant.——One who hires a vehicle is not responsible as the master of the driver of such vehicle.—*Hershberger v. Lynch*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 642.

175. NEGLIGENCE — Personal Injury—Notice.——Evidence that a sidewalk obstructed by ice had been in a dangerous condition for nine days, and had been seen by policemen and selectmen, sufficiently establishes notice to the township, available in an action for personal injuries.—*Fortin v. Easthampton*, S. J. C. Mass., Oct. 21, 1887; 5 N. Eng. Rep. 162.

176. NEGLIGENCE — Proximate Cause. —— Where a person is jolted off the platform of a car and then injured by a runaway horse, the court may well decide whether the proximate cause of the injury was the negligence of the driver of the car, and it is not the province of the jury to decide upon the question of proximate cause.—*South Side, etc. Co. v. Trich*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 627.

177. NEGLIGENCE—Proximate and Remote Cause.——Where a horse is frightened by a locomotive and draws the vehicle over a steep bank whereby the driver was injured, there is no question of proximate or remote cause.—*Burrell v. Uncapher*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 619.

178. NEW TRIAL—Practice.——A new trial will not be granted for alleged errors in the surveyor's report if the surveyor was a witness in the cause, and the change

asked for would make the report inconsistent with plaintiff's declaration.—*Littlehale v. Littlefield*, S. J. C. Me., Nov. 30, 1887; 5 N. Eng. Rep. 308.

179. NOTARY PUBLIC—Seal.——Where a notary public uses the seal of another notary, his certificate is nevertheless good and will entitle the instrument to which such seal is applied to registration or record.—*Muncie, etc. Bank v. Brown*, S. C. Ind., Dec. 3, 1887; 14 N. E. Rep. 358.

180. NUISANCE—Undertaker's Establishment.——An undertaker's establishment in a populous place is not *per se* a nuisance, and the person so alleging must prove it.—*Wescott v. Middleton*, N. J. Ct. Chan., Dec. 9, 1887; 11 Atl. Rep. 490.

181. PARTITION—Sale—Charge on Land.——A petitioner by a purchaser at a partition sale, to rescind the part of the decree making a charge on the land, is properly refused.—*Clemans' Appeal*, S. C. Penn., Oct. 31, 1887; 11 Atl. Rep. 559.

182. PARTNERSHIP—Dissolution—Conflicting Evidence.——Where, in an action for damages for a dissolution of a partnership, the evidence is conflicting, one party showing losses, the other profits: *Held*, that such evidence was sufficient to go to the jury on the question whether there would be profits or losses during the unexpired term of the partnership.—*Dart v. Laimbeer*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 231.

183. PARTNERSHIP—Firm Assets—Notice.——The creditor of a partner who receives in payment of his debt a check of the firm, signed in the handwriting of his debtor, has notice that the debt will be paid out of partnership funds, and takes the risk of the assent of the other partners.—*Graham v. Taggart*, S. C. Penn., Nov. 11, 1887; 11 Atl. Rep. 652.

184. PARTNERSHIP—Incoming Partner.——Where, upon the death of a partner, defendant agreed to become a partner and to pay a portion of the debts of the old firm, and is sued by plaintiff, a creditor of the old firm, it is held that plaintiff had no cause of action against defendant and could not avail himself in this manner of defendant's agreements with the other partner.—*Serciss v. McDonnell*, N. Y. Ct. App., Nov. 29, 1887; 14 N. E. Rep. 314.

185. PARTNERSHIP—Levy—Individual Debt.——Where partnership property is levied on by a constable for an individual debt, and then by the sheriff for a partnership debt, the purchaser under the constable's sale is only entitled to relief after satisfaction of the execution levied by the sheriff.—*Richards v. Allen*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 552.

186. PARENT AND CHILD—Support—Promise to Pay.——Where a child claims pay from her mother's estate for her support, her mother having resided with her, she must show an expectation on the part of both that compensation should be rendered therefor.—*McGarvey v. Roads*, S. C. Iowa, Dec. 10, 1887; 35 N. W. Rep. 488.

187. PAYMENT—Release.——If one having a disputed claim against another accepts in satisfaction therefore a smaller sum than his original demand he thereby releases his debtor from the remainder. It is otherwise, if he merely credits the sum paid and that at once demand payment of the balance.—*Tomkins v. Hill*, S. J. C. Mass., Dec. 5, 1887; 5 N. Eng. Rep. 290.

188. PATENTS FOR INVENTIONS—Assignment—Specific Performance.——A parol agreement to assign a patent-right, for the procuring of which both parties have shared the expense, will be specifically enforced.—*Searle v. Hill*, S. C. Iowa, Dec. 10, 1887; 35 N. W. Rep. 490.

189. PHYSICIANS—Constitutional Law—Statute.——The statute of Indiana which requires a physician to have been a resident of the State, for a prescribed period, as a condition precedent to his obtaining a license to practice medicine in that State, is not repugnant to the constitution of the United States.—*State ex rel. v. Green*, S. C. Ind., Dec. 2, 1887; 14 N. E. Rep. 352.

190. PLEADING.——Where defendant's case rests upon facts outside of the scope of plaintiff's charges, he must set out those facts in detail in his answer.—*Colburn v. Travelers' Ins. Co.*, S. J. C. Mass., Oct. 24, 1887; 5 N. Eng Rep. 182.

191. PLEADINGS—Bills and Notes—Answer.—— An answer to a suit on a promissory note, which is not verified, but alleges duress, want of consideration, and that the note was not assigned to the plaintiff for value before maturity, cannot be sustained by evidence on those allegations for lack of verification.—*Parkinson v. Boddiker*, S. C. Colo., Nov. 25, 1887; 15 Pac. Rep. 806.

192. PLEADINGS—Counterclaim—Partners.—— One sued partners on a contract for a certain amount per month and board. The defendants denied the contract, and one of them set up a counterclaim for board furnished by him to plaintiff. *Held*, that the counterclaim was properly stricken out.—*Jenkins v. Barrows*, S. C. Iowa, Dec. 14, 1887; 35 N. W. Rep. 510.

193. PLEADING—Evidence—Variance.——Variances between the pleading and proof are not fatal unless they may raise a doubt in the mind of the defendant as to the charge he is required to meet.—*Davis v. Guilford*, S. C. Err. Conn., Nov. 20, 1887; 5 N. Eng. Rep. 318.

194. PLEADING—Negligence—Trespasser.——Where it does not appear by the issues nor by the proof, that the defendant's cart was wilfully or purposely run over the deceased, who was a trespasser on the railroad track, an instruction to find for the defendant is proper.—*Gregory v. Cleveland, etc. R. Co.*, S. C. Ind., Nov. 29, 1887; 14 N. E. Rep. 228.

195. POOR LAWS—Pauper—Statute.——Construction for Massachusetts poor laws, with reference to the relief of paupers. The liability of a town for supplies furnished a pauper is purely statutory.—*O'Keefe v. Northampton*, S. J. C. Mass., Oct. 2, 1887; 5 N. Eng. Rep. 166.

196. POWER OF ATTORNEY—Certificate of Sale.——A power of attorney to sell any and all real or personal property, authorizes a sale of a certificate of purchase at a mortgage sale prior to the expiration of the time of redemption.—*Cooper v. Finke*, S. C. Minn., Dec. 16, 1887; 35 N. W. Rep. 469.

197. PRACTICE—Continuance—Laches.——A motion to continue the cause to perfect the service and to make the next term the return term in a *scire facias*, which is allowed to lie undisposed of for nearly three years, is properly refused.—*Donaldson v. Dodd*, S. C. Ga., Dec. 8, 1887; 4 S. E. Rep. 157.

198. PRACTICE—Cross-examination—New Theory.——Plaintiff cannot cross-examine a witness for the defendant to establish a new theory of the case, which is not set up by the pleadings nor suggested by any of the evidence already introduced.—*Erie & P. D. v. Stanley*, S. C. Ill., Nov. 11, 1887; 14 N. E. Rep. 212.

199. PRACTICE—Evidence—Instructions.——When the facts are disputed, all should be submitted to the jury under proper instructions, but when no reasonable construction of the evidence can entitle the defendant to a verdict, binding instructions for the plaintiff may be given.—*Maynard v. Lumberman's Nat. Bank*, S. C. Penn., Oct. 3, 1887; 11 Atl. Rep. 529.

200. PRACTICE—Instructions—Harmless Error.——Where the verdict of the jury shows that they were not misled by an erroneous instruction, the error is no ground for a reversal.—*Bedell v. Errett*, S. C. Penn., Nov. 7, 1887; 11 Atl. Rep. 571.

QUERIES AND ANSWERS.*

QUERY NO. 4.

A, of O, sells land in same State to B, of O. A takes B's mortgage for security. B lives in another State now and is reported deranged. To get summons by publications, what court, as to place, should appoint a guardian for B? O. K.